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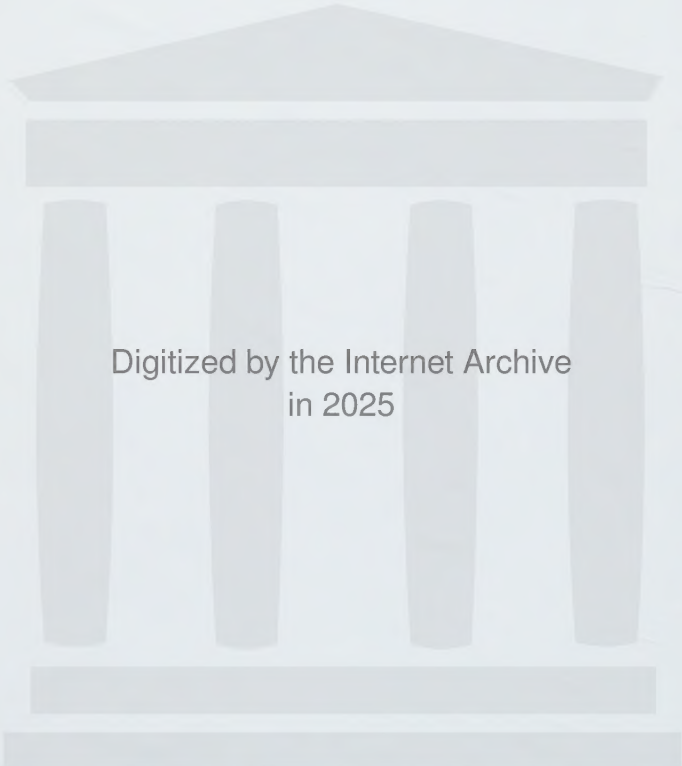
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AN

ILLUSTRATED TREATISE

ON THE

LAW OF EVIDENCE

BY

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PREFACE

To the trial lawyer no subject in the law curriculum is of more importance than Evidence. In this branch of the law questions arise very frequently, and usually they must be answered on the spur of the moment. It is essential, therefore, that the lawyer have at his tongue's end the rules and their exceptions. Moreover, since the test of the keen lawyer is his ability to make fine legal discriminations, it is also essential that he possess a well disciplined mind in the art of applying them. In the present volume an attempt has been made to state pointedly and systematically these various rules and exceptions; and since the law is an *applied* science, numerous illustrations have been given to elucidate their application. Every topic is fully illustrated; every illustration is founded upon an actual case, and for each case the citation is given. With the view of securing compactness, these illustrations, instead of being scattered throughout the book, have been made a distinct part of it and placed after the text proper. This plan, it is believed, will meet with general approval. As an aid in developing ability to make fine legal discriminations the reader is earnestly advised to study carefully these illustrations and where practicable to do so to read the cases upon which they depend.

In the preparation of this volume it has been the aim of the author to produce a text-book which will prove serviceable when used independently of any other work; but believing that it will also be found serviceable in connection with the study of Thayer's "Cases on Evidence" the general arrangement of topics in that work has been followed.

That a real need exists for a suitable text-book on the law

of Evidence, for use in law schools which do not look with favor upon the case-method of teaching, is generally conceded. The exhaustive treatises upon the subject are much too voluminous for this purpose; while the smaller ones, for various reasons, fall short of meeting it. That the present volume will meet this need is the earnest hope of the author, who, for fourteen years,—six in the University of Michigan and eight in the University of Illinois,—has had the pleasure of quizzing upon and teaching this important subject. With this end in view, no pains has been spared to secure system, clearness, brevity and accuracy.

T. W. HUGHES.

University of Illinois,
August 1st, 1906.

AS A TRIBUTE OF RESPECT AND GRATITUDE
THIS VOLUME IS DEDICATED
TO

HON. O. A. HARKER, M. A.

DEAN OF THE COLLEGE OF LAW, UNIVERSITY OF ILLINOIS

WHO FOR TWENTY-FIVE YEARS WAS AN HONORED MEMBER OF THE BENCH OF THE STATE OF ILLINOIS, AND WHOSE LEGAL LEARNING AND ABILITY, STERLING INTEGRITY AND KINDNESS OF HEART, HAVE WON FOR HIM THE CONFIDENCE AND RESPECT OF THE MEMBERS OF THE BAR, OF THE MEMBERS OF HIS FACULTY AND OF THE STUDENTS OF HIS COLLEGE, AND OF THE PEOPLE GENERALLY THROUGHOUT THE STATE.

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HUGHES ON EVIDENCE

PART I.

PRELIMINARY TOPICS

CHAPTER I.

SOME BRIEF DEFINITIONS.

§ 1. **Evidence.**—The legal means, exclusive of mere argument, of proving or disproving any matter of fact, the truth of which is submitted to judicial investigation.[1]

§ 2. **Primary evidence.**—Evidence which shows on its face that there is no better evidence of the fact in question. It is also called Original Evidence.

§ 3. **Secondary evidence.**—Evidence which is admissible when the primary evidence is not obtainable; and which, owing to this fact, is the best evidence which can be adduced.

§ 4. **Hearsay evidence.**—Evidence which depends solely for its truth or falsity, in the first instance, upon the statement of someone other than the witness, and has, in and of itself, no evidentiary force.

§ 5. **Direct evidence.**—Evidence which tends to prove the fact, or facts, in question, without the intervention of evidence of any other fact.

§ 6. **Circumstantial evidence.**—Evidence of some other fact, or facts, from which, taken singly or collectively, the existence or nonexistence of the particular fact, or facts, in question,

1—Strictly speaking, the term "Evidence" is applicable only to the medium of proof. In practice, however, it is often used interchangeably with the term "Proof." The latter term, however, strictly speaking, is applicable only to the *effect of evidence.*

may be inferred as a necessary or probable consequence. This class of evidence is also called Indirect Evidence.

§ 7. **Presumptive evidence.**—Evidence which shows the existence of one fact, by proof of the existence of one or more other facts, from which the existence of the former one may be inferred. The terms Presumptive Evidence and Circumstantial Evidence are similar in meaning, but they are not necessarily synonymous.[2]

§ 8. **Relevant evidence.**—Evidence which is legally, as well as logically, applicable to the issue joined.[3]

§ 9. **Parol evidence.**—Verbal evidence as contra-distinguished from that which is written or documentary.

§ 10. **Real evidence.**—Evidence acquired directly by the court or jury themselves, through the medium of their own senses, by an inspection of the subject-matter itself.

§ 11. **Competent evidence.**—Evidence which the very nature of the thing to be proved requires as the fit and appropriate proof in the particular case.

§ 12. **Cumulative evidence.**—Evidence of the same kind to the same point.

§ 13. **Prima Facie evidence.**—Evidence which is sufficient to establish the fact, or facts, in question, but which may be rebutted and overcome by other evidence.

§ 14. **Conclusive evidence.**—Evidence which is sufficient to establish the fact, or facts, in question, and which may not be contradicted.

§ 15. **Satisfactory evidence.**—Evidence sufficient to ordinarily satisfy an unprejudiced mind honestly seeking the truth.

2—For comments, and references to discussions, pertaining to the distinguishing features of these two terms, see Bouvier's Law Dictionary, Vol. I., p. 703.

3—The terms "logically relevant" and "legally relevant" are not synonymous. Evidence to be admissible must be legally relevant. In Art. 1, of Stephen's Digest of the Law of Evidence, he says: "The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events, one either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other." This definition, however, is applicable to the term "logically relevant"; and is too broad to apply to the term "legally relevant." Legal

§ 16. **Proof.**—The conviction of the mind of the court or jury, produced by legal means, of the existence or nonexistence of the fact, or facts, in question.

§ 17. **Res gestæ.**—Acts or declarations, which are connected with the fact, or facts, in issue, which are contemporaneous with such fact, or facts, and which characterize and explain them.[4]

relevancy requires a higher standard of evidentiary force. See Bouvier's Law Dictionary, Vol. 2, p. 866; United States v. Ross, 98 U. S. 281, 283.

4—When it is material to show, upon the trial of a cause, the occurrence of any fact, it is competent and proper to also show any accompanying act, declaration or exclamation, which was contemporaneous with the occurrence of such fact, and which characterizes and explains it. Such acts, declarations or exclamations, are known as *res gestæ*. The true test of the admissibility of such testimony is, that the act, declaration or exclamation, must be so intimately interwoven with the fact which it characterizes and explains, as to be regarded as a part of the transaction itself; and also, to clearly negative any premeditation or purpose to manufacture testimony. The true inquiry, in the case of the declaration, is, whether the declaration is a verbal act, explaining and interpreting other parts of the transaction of which it is itself a part; or, is merely a history, or a part of a history, of a completed past transaction. In the former case, it is admissible in evidence; in the latter case it is not. Lauder v. The People, 104 Ill., 248; Chicago Ry. Co. v. Becker, 128 Ill., 545.

CHAPTER II.

JUDICIAL NOTICE.

§ 1. **Rule and exceptions.**—A characteristic feature of the English law of evidence is, the facts of a case shall be proved by the best evidence attainable. To this important rule there are two exceptions: (1) Facts of which courts take judicial notice; (2) Facts which are admitted to be true.

§ 2. **Scope.**—The doctrine of Judical Notice is not peculiar to the law of evidence. It is applicable as well to the law of pleading. It is as broad, indeed, as the general topic of legal reasoning. As its rules prescribe what facts in issue need not be proved, it applies to the law of evidence in a negative sense, and only indirectly.

The law of evidence is a growth, based very largely upon judicial legislation. It is still growing, and will continue to do so. The doctrine of Judicial Notice is also a growth, and its scope is also becoming more and more extended. Art, science and general knowledge are making rapid progress in the world, and it behooves courts to keep abreast of this advancement. It is important, however, that courts exercise with due care the function of Judicial Notice. If the ground is general knowledge, the requisite notoriety should be found to exist. A reasonable doubt upon this point necessitates proof. As regards what constitutes sufficient notoriety, for the proper exercise of this function, judicial minds differ. As a result, we find upon this question discordant decisions. Facts, which courts are bound to judicially notice, are deemed conclusively established; and all evidence relating to them may be rejected. Natural phenomena are judically noticed, but not extraordinary circumstances. Facts judicially noticed need not be alleged in the pleadings. The fact that matters judicially noticed are incorrectly alleged in the pleadings is not material; nor are such matters admitted by demurrer. The doctrine of Judicial Notice pertains also to jurors, but only to a limited extent.

§ 3. **Classification.**—Facts of which courts take judicial notice may be divided into two general classes: (1) Facts which courts *must* judicially notice; (2) Facts which courts *may* judicially notice. The dividing line between these two classes is not a fixed and definite one. As already indicated, the two reasons for this are: (1) The field of Judicial Notice is becoming more and more extended; (2) As regards what constitutes sufficient notoriety, judicial minds differ.

§ 4. **Compulsory judicial notice.**—Courts are bound to judicially notice those facts which the statute law, or the common law, makes it their special duty to know and recognize. Such facts include: (1) The public laws; (2) Matters of public interest; (3) Matters peculiarly within the knowledge of the particular court; (4) Matters of universal notoriety.

§ 5. **Public laws.**—Public laws are those which extend to all persons within the territorial limits described in them. They include: (1) The Constitution of the United States; (2) The constitutions of the several states; (3) The treaties of the United States; (4) The public statutes of the United States; (5) The public statutes of the several states; (6) The law of nations; (7) The law merchant; (8) The common law.

§ 6. **Constitutions.**—The United States Constitution is judicially noticed by both the federal and the state courts. A state constitution is judicially noticed by the courts of that particular state, and by the federal courts; but not by the courts of the sister states.

§ 7. **Treaties.**—The treaties of the United States are judicially noticed by both the federal and the state courts; but the treaties between foreign countries are not judicially noticed.

§ 8. **Federal public statutes.**—Federal public statutes are judicially noticed by the courts of both the federal and the state courts.

§ 9. **State public statutes.**—The public statutes of the several states are judicially noticed by the courts of those states, respectively, and also by the federal courts, except that, in some cases they are not judicially noticed by the Supreme Court of the United States.

§ 10. **The law of nations.**—The law of nations is judicially noticed by the courts of all civilized countries.

§ 11. **The law merchant.**—The law merchant is judicially noticed by both the federal and the state courts.

§ 12. **The common law.**—The English common law is judicially noticed by both the federal and the state courts. The common law of a state is judicially noticed by the courts of that particular state, but not by the courts of the sister states. It is also judicially noticed by the federal courts, except that, in some cases it is not judicially noticed by the Supreme Court of the United States.

§ 13. **The Supreme Court of United States.**—The Supreme Court of United States, in the exercise of original jurisdiction, and also in the exercise of appellate jurisdiction from a federal court, takes judicial notice of the public laws of the several states. It also takes judicial notice of all federal public statutes. It does not, however, in the exercise of appellate jurisdiction from the highest court of a state, take judicial notice of the laws of a sister state.

§ 14. **Foreign public laws.**—Foreign public laws are not judicially noticed. The laws of one state are foreign to the other sister states, and are not judicially noticed by the courts of those states.

§ 15. **Municipal charters.**—Municipal charters are public laws, and are judicially noticed by the courts of the state in which they are in force, and also by the federal courts, except that, as already indicated, they are not, in some cases, judicially noticed by the Supreme Court of the United States.

§ 16. **Municipal ordinances.**—Municipal ordinances are not judicially noticed except by the courts of the particular municipality in which they operate, and by courts of appeal to which cases are taken from that particular municipality.

§ 17. **Charters of railroad corporations and banks.**—Railroad corporations, and banks, are organized for private gain; but, by the weight of authority, their charters are public acts and are judicially noticed.

§ 18. **Private corporations.**—Private corporations, created under general incorporation acts, are not judicially noticed; but the general acts, under which they are organized, are judicially noticed. Private corporations, created by special acts,

are not judicially noticed unless a statutory provision exists to the contrary.

§ 19. **Foreign corporations.**—Foreign corporations are not, as a general rule, judicially noticed. A few courts, however, have made some exceptions to this rule.

§ 20. **Private statutes.**—Private statutes are not judicially noticed. A statute which prohibits the sale of spirituous liquors in certain townships of a particular county is not a private statute, and is judicially noticed. All statutes, which, at the time of their enactment, are declared public acts, are judicially noticed.

§ 21. **Courts.**—The federal courts take judicial notice of one another, and of the courts of the several states; and the state courts take judicial notice of one another, including those of the sister states, and of the federal courts.

§ 22. **Matters of public interest.**—Matters of public interest are presumed to be within the knowledge of people generally; and, for this reason, are judicially noticed. They include: The titles and seals of foreign sovereigns, recognized by the United States, and the flags of their countries; foreign notaries and their seals; foreign admiralty and maritime courts; sittings of congress, and of the state legislatures; the accession of the chief executives of the nation, and of the state or territory, and their powers, privileges, and the genuineness of their signatures; the heads of departments, and the principal officers of state; the appointment of a cabinet, or foreign, minister; the judges of the courts, their seals, and their terms of court as regulated by law, but not their rules of court; the territorial jurisdiction of the United States, and of the state or territory; the political divisions of the State into counties, townships, cities and school districts, and their relative positions, but not their precise boundaries; public proclamations of war and peace; the legal coinage, and the weights and measures of the country; matters of public history; the general geographical features of the country; the ordinary public feasts and festivals; general elections, the dates thereof, and the officers to be elected thereat; the population of a municipality as indicated by the last official census returns; things which must happen according to the course of nature; the general meaning of words, and of common abbreviations.

§ 23. **Matters peculiarly within the knowledge of the court.**—Such matters are judicially noticed by the particular court. They include: the records of the court; its rules of practice; its own officers; its terms of court; its jurisdiction; proceedings in the pending suit.

§ 24. **Matters of universal notoriety.**—Facts which are so notorious as to be universally accepted as true, courts are bound to judicially notice. Such facts are very numerous, many of which might well be classed under the head of matters of public interest. Various natural phenomena, among others, belong to this class.

§ 25. **Discretionary judical notice.**—Facts, which have only a common notoriety, as distinguished from a universal one, courts *may* in their discretion, judicially notice. This class also includes a great variety of facts. No general rule is applicable to it. Each case is governed by its own particular circumstances. The question, in all cases, is, has the fact sufficient notoriety to justify the court to judicially notice it. Among others, many principles of art and science, which are familiar and generally recognized, belong to this class.

CHAPTER III.

PRESUMPTIONS.

§ 1. **Scope**—The doctrine of Presumptions and the doctrine of Judicial Notice are similar in the following respects: (1) Neither is peculiar to the law of evidence. (2) Each is as broad as the doctrine of Legal Reasoning. (3) Each pertains to the law of evidence only indirectly. The doctrine of Presumptions is not concerned at all with the admissibility of evidence, but merely with its sufficiency. Prima facie presumptions shift the burden *of proceeding with evidence* upon the party against whom they operate. In no case, however, do presumptions shift the burden of proof *in its true sense.* Presumptions are based upon facts established by direct evidence, and not upon other presumptions.

§ 2. **Origin.**—It is probable that all presumptions had their origin in inference. Judges have always been more or less suspicious of juries. It is only natural, therefore, that judges have seized opportunities to control, in a measure, verdicts. In the course of their development, some presumptions have passed through several stages. A good illustration of this is the seven-years' absence rule. In the first stage, a mere inference of death was drawn. In the second stage, the court advised the jury that such inference *might well* be drawn. In the third stage, the court instructed the jury that such inference *ought* to be drawn. In the fourth and last stage, the court instructs the jury that such inference *must* be drawn. Thus, what was formerly a mere inference has developed into a prima facie rule of law.

§ 3. **Definition.**—Presumptions are either rules of law, or inferences, of the existence or nonexistence of one or more facts, which must or may be drawn from proof of one or more other facts.

§ 4. **Classification.**—Presumptions are of two classes: (1) Presumptions of Law; (2) Presumptions of Fact. Some writers add a third class: Presumptions of Law and Fact.

§ 5. **Sub-classifications.**—Presumptions of law are subdivided into two classes: (1) Conclusive Presumptions of Law; (2) Disputable Presumptions of Law.

§ 6. **Presumptions of law.**—A Presumption of Law is a rule of law, binding upon the court or jury, and not a mere inference. It establishes either an absolute fact, or, a prima facie fact. In the former case the presumption is conclusive. No evidence is admissible to rebut it. In the latter case it is disputable. Its effect is to shift the burden of proceeding with evidence, upon the party against whom it operates.

§ 7. **Conclusive presumptions of law.**—Conclusive Presumptions of Law are, in reality, substantive rules of the positive law. They have always been comparatively few; and, at present, are more so than formerly. This is owing to the fact that several presumptions, which were formerly treated as conclusive, are now treated as disputable. The following cases include the principal presumptions of law which are conclusive: An infant, under seven years of age, is conclusively presumed incapable of committing any crime. Continuous adverse user of land for twenty years conclusively establishes title; and, if the party so holding is unable to produce evidence of his title, there is a conclusive presumption of law that a lost grant exists. A boy under fourteen years of age is conclusively presumed incapable of committing rape. A girl of tender years is conclusively presumed incapable of consenting to sexual intercourse. In Queen Elizabeth's reign, the age was fixed by statute at ten years. In this country it varies in the several states, ranging from twelve to eighteen years. In Illinois, it is sixteen years. All persons are presumed to know the law. This presumption is based upon public policy. No effectual administration of the law could exist without it. Proof that a custom has existed during living memory raises the presumption that it has existed immemorially; and proof that it has existed immemorially raises the presumption of legal origin.

§ 8. **Disputable presumptions of law.**—This class of legal presumptions includes many more than the other class. Perhaps the most highly favored one is that of innocence. All persons, accused of crime, are presumed innocent until their

guilt is established beyond a reasonable doubt. This presumption obtains in both civil and criminal cases; and, when the question of guilt is raised either directly or indirectly. Other illustrations of this class are the following: Persons who cohabit as husband and wife, and who are reputed to be married, are presumed to be legally married. A child, born during lawful wedlock, is presumed to be legitimate. Upon the ground of decency and morality, circumstances may render this presumption conclusive. A married woman, who commits a crime, other than treason, murder, felonious wounding, keeping a bawdy house, and perhaps highway robbery, in the presence of her husband, is presumed to be coerced by him. Parties to a contract are presumed to know its contents, and also its legal effect. This presumption obtains even when the parties cannot read nor write. In the absence of fraud, or mistake, it is conclusive. A sane person is presumed to intend the natural and probable consequences of his voluntary acts. In the absence of fraud, or mistake, this presumption is generally conclusive. In the case of crimes, however, involving specific criminal intent, it is not conclusive. A person who feloniously kills another by means of a deadly weapon is presumed to do so maliciously. Blackstone says "All homicide is presumed to be malicious until the contrary appeareth in evidence." This statement has been frequently criticised, however, owing to the fact that it places the burden of proof upon the defendant. When a person has been absent from home for seven years, and has not been heard from during that time, by those who would naturally have heard from him, if alive, he is presumed to be dead. There is no presumption, however, as to the time of his death.[1]

1—Upon this point some decisions are quite perplexing. For example, in Reedy v. Millizen, 155 Ill. 636 (at page 638), the court say: "While, therefore, it is true that there is no presumption that death occurred at any particular time within the seven years, it is also true that, in the absence of contravening facts or controlling presumptions, it will be presumed that life continued during the entire period." The logical conclusion is that, in the absence of contravening facts or controlling presumptions, death occurred on the last day of the seven years. There is, however, no legal presumption to this effect in any case. When death occurred is never anything more than a mere presumption of fact.

§ 9. **Presumptions of fact.**—A Presumption of Fact is a mere inference drawn from proof of one or more facts. Unlike a Presumption of Law, it is not binding upon the court or jury. It is merely circumstantial evidence of the existence or nonexistence of one or more facts. Its weight depends upon the circumstances of the particular case. It is sometimes called a natural presumption. This is owing to the fact that it is not governed by artificial rules like a Presumption of Law, but is deducible from one or more facts by a natural process of reasoning. Presumptions of Fact are very numerous. The presumption of sanity belongs to this class. It is a mere inference drawn from the fact that ordinarily people are sane. It may, however, obviate the necessity of establishing sanity by affirmative proof. Even in criminal cases it is sufficient for this purpose in the absence of evidence to rebut it. In the probate of a will, the testator's sanity must be established by affirmative evidence. The fact that a certain condition or state of things existed at a particular time raises a presumption of fact that such condition or state of things continued to exist. Thus, the fact that a certain person was living at a certain time, and at a certain place, raises, in the absence of any evidence to the contrary, a presumption of fact that he is still living, and at the same place. A partnership, when established, raises a presumption of fact that it continues to exist. Proof that parties were living in adultery, raises a presumption of fact that they continue to live in adultery. Proof that a man followed the occupation of a gambler for many years raises a presumption of fact that he is still a gambler. Proof that a person was insane, raises a presumption of fact that he continues insane. Proof that a letter, properly addressed and stamped, was delivered to a postman, or dropped into a postal box for collection and delivery, raises a presumption of fact that it duly reached its destination. A similar presumption of fact is raised when a telegram is given to the proper party for transmission. In the absence of evidence to the contrary, a presumption of fact exists that, the members of a partnership are equally interested in both the capital and the profits of the business, and liable for losses in the same proportion. When a vessel springs a leak, without any apparent cause, within a few days after she left the dock, a presump-

tion of fact is raised that she was unseaworthy when she started upon her voyage. When two or more persons perish in the same common disaster, there is, at common law, no legal presumption of survivorship, based upon the age or sex of the parties. The civil law rule is to the contrary. At common law, the party alleging survivorship must prove it. The circumstances may be such, however, as to raise a presumption of fact. Presumptions are prospective, and not retrospective. When a husband advances money to his wife, or a parent to a child, the advancement is presumed to be a gift and not a loan. When a person pays another a subsequent debt there is a presumption raised that all prior debts to the payee, which are due, have been paid. This presumption is raised when the debtor gives his creditor a promissory note. A receipt for the last instalment of a debt also raises a presumption that all prior instalments have been paid. When a person withholds evidence, which it is his duty to produce, a presumption of fact arises that the evidence withheld is unfavorable to him. When a person wilfully destroys documentary evidence, a presumption of fact arises that he did so fraudulently; and, in the absence of a legal excuse for the act, he is estopped from giving secondary evidence of the contents of the document. When the officers of a neutral vessel destroy the ship's papers, in time of war, in anticipation of a search, a strong presumption of fact is raised of an intention to destroy incriminating evidence. When a crime has been committed, the attempted flight of an accused person raises a presumption of fact of his guilt. When a party to an action attempts to bribe a witness in the case, a presumption of fact arises that his cause is an unjust one. The assumption by a person of the functions of a public office raises a presumption of his appointment and qualification, sufficient to establish a prima facie case. When a prior act is essential to the validity of an official act, the performance of the prior act is presumed, upon the performance of the official act. When a person purchases real estate, and the deed is taken in the name of another person, other than his wife or child, a presumption arises of a resulting trust in favor of the purchaser. In the absence of evidence as to whether a particular death was accidental or suicidal, a presumption exists that it was accidental. This is based upon the

fact that people generally are anxious to live and avoid danger. When a person is charged with misconduct, either in business or social relations, a presumption exists against such misconduct. When infancy is alleged as a disability, a presumption always arises against it. A man of mature age is presumed to possess the normal powers of virility. When an abortion is performed, based upon an alleged necessity of saving the life of the mother or child, a presumption exists against such necessity. A presumption exists that a male child, under fourteen years of age, has not reached the age of puberty, and is therefore incapable of committing the crime of rape.

CHAPTER IV.

BURDEN OF PROOF.

§ 1. **Double sense.**—The term "Burden of Proof" is used in a double sense. It has a primary meaning and also a secondary meaning. In its primary and true sense it means the duty of establishing one's case. In its secondary sense it means the duty of going forward with evidence. In the former sense it never shifts. In the latter sense it may shift, during the trial, repeatedly.

§ 2. **Upon whom it rests.**—The burden of proof, in its true sense, rests upon the party against whom the judgment should be rendered if no evidence at all were given. The matter is usually determined by an inspection of the pleadings. As a general rule, it falls upon the party who substantially alleges the affirmative of the issue, and this party is usually the plaintiff. In substance and effect, the allegation may be affirmative, and in a sense negative. Thus, in an action for malicious prosecution, want of probable cause is an essential element of the plaintiff's case, and the burden of proving it is upon him. Again, in an action by a landlord against his tenant for breach of his covenant to make repairs, the failure of the tenant to make such repairs is an essential element of the plaintiff's case, and the burden of proving it rests upon him. In such cases, less proof is usually required than in cases where the averments are wholly affirmative. If the subject-matter of the averment is peculiarly within the knowledge of the party other than the one who makes it, the burden of proof, as regards the subject-matter of that averment, is upon that other party. Thus, in an action against a party for selling intoxicating liquors, or, practicing a profession, without a license, the burden of proof is upon the defendant to prove that he had a license.

§ 3. **Effect of presumptions.**—Presumptions do not effect the burden of proof in its primary and true sense; but, disputable presumptions of law, which take the place of evidence

in establishing a prima facie case, do shift the burden of proof in its secondary sense.

§ 4. **Amount of proof required in criminal cases.**—In criminal cases, the burden is upon the prosecution to prove the defendant's guilt beyond a reasonable doubt. In civil cases too, according to the English rule, when the commission of a crime is in issue it must be proved beyond a reasonable doubt; but, in this country, by the great weight of authority, it is sufficient to prove it by a preponderance of the evidence. In Illinois, however, the English rule has prevailed.[1]

§ 5. **Insanity as a defence in criminal cases.**—When insanity is pleaded as a defence to a criminal charge, it is held, in many states, that the burden is upon the accused to prove his insanity by a preponderance of the evidence. In many other states, including Illinois, the burden, after the accused has offered sufficient evidence to cast a reasonable doubt upon the presumption of his sanity, is upon the prosecution to prove, beyond a reasonable doubt, that the accused, at the time the alleged offence was committed, was sane. The latter rule, it is submitted, is logical and in accord with the better view. A few courts have held that the burden is upon the defendant to establish his insanity beyond a reasonable doubt. This rule, it is submitted, is wholly illogical and unjust.

§ 6. **Insanity as a defence in will cases.**—Upon the question of burden of proof, when insanity of the testator is interposed as a defence to the probate of his will, the decisions are in hopeless conflict. Many hold that the burden is upon the proponent to establish by a preponderance of the evidence, not only the due execution of the will, but also the sanity of the testator at the time it was made. This rule obtains in New York, Massachusetts, Michigan, Minnesota, Maine, and in some other states. Many other decisions hold that testators, like other persons, are presumed to be sane until the contrary is shown, and that the burden of proof is upon the contestant. This rule obtains in Pennsylvania, New Jersey, Alabama, Wis-

1—Crandall v. Dawson, 1 Gilm., 141; Sprague v. Dodge, 48 Ill., 142; 556; McConnel v. Ins. Co., 18 Ill., Germania Ins. Co. v. Klewer, 129 228; Harbison v. Shook, 41 Ill., Ill., 599-612.

consin, Iowa, Indiana, Maryland, and in some other states. In Illinois, the statute provides that, before a will can be admitted to probate, or held to be valid, affirmative proof must be given of the testamentary capacity of the testator by the subscribing witnesses. Under this statute, the courts hold that, if, after sufficient evidence is given by the proponent to meet the requirements of the statute, contradictory evidence is given by the contestant, the proponent must prevail, unless the contradictory evidence is sufficient to overcome or neutralize, not only the affirmative evidence in favor of the testamentary capacity of the testator, but also the presumption of his sanity.

§ 7. **Negligence.**—Ordinarily, in an action for damages caused by negligence, the burden of proof, as regards the negligence of the defendant, is upon the plaintiff. If the defendant sets up, in defence, contributory negligence of the plaintiff, the burden of proof, upon this issue, is, by the weight of authority, upon the defendant. This rule obtains in the federal courts. In some states, including Illinois, the burden is upon the plaintiff to prove not only the negligence of the defendant, but also due care on his own part.

§ 8. **Negligence of common carriers.**—In an action against a common carrier for loss of goods, or damage to them, the burden, after the plaintiff has proved the loss or damage, is upon the defendant to show that it resulted from some cause for which the carrier is not liable. Even when the loss or damage falls within an excepted risk, the burden, according to the better view, is upon the carrier to prove want of negligence on its part. This rule prevails in Illinois. Many courts, however, in such cases, put the burden upon the plaintiff to prove negligence on the part of the defendant.

In an action against a railway company, for damage caused by fire communicated from its engine, the burden, after the plaintiff has proved that the fire was communicated from the engine, is upon the company to show that the engine was properly constructed and managed.

In an action against a common carrier for personal injuries, the rule, as stated in the last preceding section, is applicable, except where the plaintiff, at the time his injuries were received, was a passenger of defendant. In the latter case, ow-

ing to the peculiar relation of the parties, and the contract to carry safely, the plaintiff makes out a prima facie case by showing that he was injured while a passenger of defendant, by reason of some defect or failure in the vehicle, or by reason of some mismanagement. The specific defect or mismanagement, which caused his injuries, he is not required to show. The burden of explanation is upon the defendant. In the absence of such contract to carry safely, however, the burden is upon the plaintiff to trace the cause of his injury directly to the fault of the carrier.

In an action against a telegraph company, for failure to transmit a message as received, the burden, after the plaintiff has made a prima facie case by showing the failure and damage, is upon the company to prove want of negligence on its part.

§ 9. **Negligence of bailees.**—An ordinary bailee for hire is not an insurer against loss. He is required to exercise only ordinary care. In an action against him, by the bailor, for loss of the property bailed, the burden, after the loss has been explained, as by fire, theft, etc., is upon the bailor to prove negligence on the part of the bailee. If, however, there is a total default on the part of the bailee, in failing to account for the loss, the burden is upon him to explain the non-delivery of the property. In an action against a bailee for injuries to property returned in a damaged condition the burden is upon the bailee to prove that he exercised due care.

§ 10. **Negligence of innkeepers.**—At common law, "keepers of public inns are bound well and safely to keep the property of their guests accompanying them at the inn."[2] In an action by a guest against an innkeeper for loss of his property from the inn, the burden, after the plaintiff has proved his loss, is upon the innkeeper to prove, not merely that the loss was not caused by his negligence, or that of his servants, but also, that it was due to the negligence of the guest himself, or to some other cause which relieves the innkeeper from liability. This rule, however, is applicable only to the case of guests at the inn, and does not apply to the case of permanent boarders at

2—Johnson v. Richardson, 17 Ill., 302; 63 Am. Dec. 369, 371.

the inn. In some states, statutes have been passed which make the liability of innkeepers considerably less rigorous.

§ 11. **Quo warranto proceedings.**—In quo warranto proceedings, the burden is always upon the defendant to show a good title to the office he holds. If he fails to do so the people are entitled to a judgment of ouster.

§ 12. **Statute of limitations.**—When the statute of limitations is interposed as a defense to an action, the burden, according to many of the earlier cases, is upon the plaintiff to prove that his action was commenced within the statutory period. Some of the modern decisions, including those of Massachusetts,[3] sustain this view. According to the better view, however, and which is sustained by the courts of Illinois, this plea is an affirmative defense, and the burden is upon the defendant to prove it.[4]

§ 13. **Fraud.**—Ordinarily, when fraud is alleged in an action, the burden of proof is upon the party who alleges it; but, when a *cestui que trust* alleges fraud against his trustee, the burden is upon the trustee to prove that no undue advantage was taken by him of the fiduciary relation.

§ 14. **Exception to a statute.**—When one of the parties to an action claims the benefit of an exception to a statute, such as infancy, coverture, etc., the burden is upon him to prove that his case falls within the exception.

§ 15. **Promissory notes.**—When the defendant pleads want of consideration to an action on a promissory note the burden of proof in its true sense is upon the plaintiff. This is owing to the fact that a valuable consideration for the defendant's promise is an essential element of the plaintiff's case. The fact that a presumption exists that a valuable consideration was paid for the promise does not change the rule, since presumptions never change the burden of proof in its true sense. They merely take the place of evidence.

There are Illinois decisions, however, which put the burden of proof in this class of cases upon the defendant. But unless

3—Slocum v. Riley, 145 Mass., 370.

4—See note, 81 Am. Dec., 725.

the term "burden of proof" in these decisions is used in its secondary sense of going forward with evidence, and not in its primary and true sense of establishing one's case, they are erroneous.

On the other hand, when the defendant pleads payment, or fraud, or any other affirmative defense, thereby admitting the validity of the note and seeking to avoid it by establishing an independent defense. The burden of proof in its true sense rests upon him.

§ 16. Statutes.—Both in England and in this country statutes exist which, in some cases, modify the general rules relating to burden of proof. Some of these statutes are applicable to civil cases and some to criminal cases. In some cases their constitutionality has been questioned, but it is well settled that the legislature has authority to prescribe reasonable rules of evidence both in civil and in criminal cases.

§ 17. **The right to open and close.**—As a general rule, the right to begin the introduction of evidence, and to open and close the argument, belongs to the plaintiff. This is owing to the fact that upon him usually rests the burden of proof. If, however, the defendant admits the plaintiff's allegations, which constitute his cause of action, and sets up affirmative matter of defense in avoidance thereof, and the damages claimed by the plaintiff are liquidated, the defendant is entitled to open and close. In all actions, whether *ex delicto* or *ex contractu*, if the damages claimed are unliquidated, and the amount not admitted, the right to open and close belongs to the plaintiff. Admissions by the defendant do not give him the right to open and close, unless they are so complete as to establish of themselves the plaintiff's cause of action. Whether an erroneous ruling by the trial court, upon the question of this right, is a ground for reversal by a higher court, is not well settled. In most jurisdictions, the courts hold that such an erroneous ruling by the trial court so far affects the merits of the case as to justify a reversal by a higher court. In other jurisdictions, including Illinois, the courts refuse to recognize it as a ground for a reversal by a higher court, but recognize it as a proper ground for the granting of a new trial by the trial court.

CHAPTER V.

ADMISSIONS.

§ 1. Definition.—Admissions are voluntary acknowledgments of the existence or truth of certain facts, made by a party either orally, in writing, or by conduct.

§ 2. Classification.—Admissions are divided into two classes: (1) Express Admissions; (2) Implied Admissions. The former are also called Direct Admissions, and the latter Indirect Admissions. Express admissions are created by words. Implied admissions are inferred from conduct. Admissions of criminal conduct are called Confessions. These are discussed in the next chapter.

§ 3. By whom binding admissions can be made.—Admissions are binding when made by: (1) The real party in interest, and who is also a party to the record; (2) One who has a substantial interest in the suit, though not a party to the record; (3) One who is a nominal party to the record, acting in the representative capacity of trustee for the real party in interest; (4) One who is identified in interest, either in blood, in estate, in contract, or in law, with a party to the record.

§ 4. Admissions of an agent.—The admissions of an agent, when made within the real or apparent scope of his employment, are binding upon his principal. The relation of principal and agent, however, must first be established by extrinsic evidence.

§ 5. Admissions of a partner.—The admissions of a partner, when made within the real or apparent scope of the partnership relation, are binding upon his copartners. The partnership relation, however, as in the case of agency, must first be established by extrinsic evidence. According to the early English rule, the admissions of a partner, made after the decease of his copartner, as to past transactions, were binding upon the representatives of the deceased copartner. The mod-

ern rule, however, according to the better view, is to the contrary. The admissions of a partner, since deceased, are binding upon his surviving partners; and the admissions of a dormant partner are binding upon his copartners.

§ 6. **Admissions of a prior owner of real estate.**—The admissions of a prior owner of real estate, made while vested with the title, are binding upon his grantee. This is owing to the identity of interest between the parties to the subject-matter concerning which the admissions are made. Such admissions are not admissible, however, according to the better view, to vary the tenor of a deed, or to destroy the record title. The admissions of a prior owner of land, made after he parts with the title, or before he obtains it, are not binding upon his grantee. Those made after he parts with the title are, however, binding upon his heirs who claim adversely to the grantee. They are also binding upon the grantee if made in his presence and not denied by him. If the grantor, by permission of the grantee, remains in possession of the land after parting with the title, his admissions, as to the nature and *bona fides* of the transaction, are binding upon the grantee.

§ 7. **Admissions of a prior owner of personal property.**—The admissions of a prior owner of personal chattels, or choses in action, are, as a general rule, binding upon his vendee or assignee. This rule is not applicable, however, to negotiable instruments in the hands of *bona fide* purchasers. In a few jurisdictions, including New York, the rule, in other cases, is very much restricted. In these few jurisdictions the courts hold that a purchaser of a chattel, or a chose in action, for a valuable consideration, has rights independent of the vendor, and beyond his control, and therefore his admissions are not binding upon his vendee; but, if the transfer of title results by operation of law, as in the case of death, bankruptcy, etc., admissions of the prior owner, while holding the title, are binding upon his vendee. In most jurisdictions, however, including Illinois, no such distinction is made, and in both classes of cases the general rule is applicable.

§ 8. **Admissions of a joint owner, of a tenant in common, and of a landlord.**—The admissions of a joint owner are bind-

ing upon the other joint owners. The joint ownership, however, must be real and not merely apparent. A mere community of interest is not sufficient. Thus, the admissions of a tenant in common are not binding upon the other tenants in common. The admissions of a landlord, made within the scope of the relation, are binding upon his tenant.

§ 9. **Admissions of an executor or administrator, of a devisee or legatee, and of an heir.**—The admissions of an executor, or administrator, are not binding upon his co-executor, or co-administrator, respectively; nor are they binding upon the heirs, devisees, or legatees. Nor are the admissions of a devisee, or legatee, binding upon his co-devisees, or co-legatees, respectively; nor those of an heir upon his co-heirs.

§ 10. **Admissions of an ancestor, of a testator, of an intestate, and of a tenant for life.**—The admissions of an ancestor are binding upon his heirs; those of a testator upon his executor, or his administrator with the will annexed, and also upon his devisees and legatees; and those of an intestate upon his administrator. The admissions of a tenant for life, however, are not binding upon a subsequent tenant for life, nor upon the remainder man. This is owing to the fact of want of privity between them.

§ 11. **Admissions of a trustee, and of a cestui que trust.**—The admissions of a trustee are not binding upon his co-trustees; nor, as a general rule, are they binding upon his *cestui que trust.* If, however, the trustee is a nominal party to the record, or has express or implied authority in other cases to make admissions, they are binding upon the *cestui que trust.* The mere fact of the relation, however, does not make them binding. But the admissions of a *cestui que trust,* owing to the fact that he is the real party in interest, are binding upon his trustee.

§ 12. **Admissions of a principal debtor, of a joint obligor, and of a joint tort feasor.**—The admissions of a principal debtor are binding upon his surety, provided they are made while the relation of principal and surety exists. If, however, they are made after the relation is terminated they are not binding upon the surety. The admissions of a joint obligor of a bond or note are binding upon his co-obligors; but the ad-

missions of a joint obligor, made after the decease of a co-obligor, as to past events, are not binding upon the representatives of the deceased co-obligor; nor are the admissions of one surety binding upon his co-surety, nor those of one indorser of a note or bond, binding upon the other indorsers. The admissions of a joint tort-feasor are not, as such, binding upon the other joint tort-feasors. They may, however, be admissible as declarations relating to, or forming a part of, the *res gestæ*, and, upon this ground, be binding. It is upon this ground that the admissions of one conspirator are binding upon his co-conspirators. In such cases, the fact of the conspiracy must first be established by extrinsic evidence before the admissions are admissible against the co-conspirators.

§ 13. **Admissions of a husband, and of a wife.**—The admissions of a husband, or of a wife, are not, based upon the marital relation, binding upon the other spouse. They may, however, in either case, be binding upon the other, provided the one who makes them is acting as the agent of the other, and they are made within the scope of this relation.

§ 14. **Admissions of an attorney-at-law.**—The admissions of an attorney are binding upon his client, on the ground of agency. To obviate the necessity of proof in a case, he may admit the truth of certain alleged facts. Thus he may admit the execution of a certain instrument, or the amount due on a debt. He may also, on the ground of agency, waive informalities, consent to a non-suit, or discontinue an action. In England, he has implied authority to compromise his client's claim; but, in this country, the weight of authority is to the contrary. The admissions of an attorney at one trial are not, as a general rule, binding upon his client at a subsequent trial. If, however, they are absolute and unqualified, some courts hold that they are. The safer plan is to restrict them to the former trial. Admissions contained in the pleadings are admissible in a subsequent suit, and binding, although the parties to the two suits are different, provided the admissions are relevant to the case. Admissions in an affidavit, or deposition, are binding in a subsequent suit, and are entitled to much weight; but they are not conclusively binding. Casual and informal admissions, made by an attorney out of court, are not binding upon his client.

§ 15. **A demurrer and a plea as admissions.**—A demurrer is an admission of the truth of all the facts well pleaded for the sole purpose of having their legal sufficiency determined by the court. A demurrer to evidence is an admission of the truth of all the facts which a jury might reasonably infer from the evidence in the case. A plea to a bill, or to a part of it, admits the truth of all the material facts well pleaded in the bill, or in the part of the bill it opposes, so far as they are not denied by the plea. The admission is conclusive, provided the plea is allowed, or issue is taken on it by the complainant, as he thereby admits its legal sufficiency; but if the plea is overruled, the admission is not binding.

§ 16. **Basis and effect of admissions.**—Admissions may be based either upon personal knowledge, or hearsay information. The source of the information is immaterial. The ground of their admissibility is the adverse interest of the person who makes them. Admissions, unlike estoppels, are not conclusive. Extrinsic evidence is always admissible to contradict them. The doctrine of estoppel is said to be "the doctrine of admissions hardened." The so-called parol evidence rule is not applicable to admissions. Hence an oral admission is receivable in evidence when the facts in issue are the contents of a written instrument, or matters of record. Oral admissions, as a general rule, are received with caution, carefully scrutinized, and considered weak evidence. If, however, they are deliberately made and clearly proved they may be entitled to much weight.

§ 17. **Admissions excluded.**—There are two classes of admissions that are not binding: (1) Those made under duress; (2) Those made to effect a compromise. Some courts hold that an offer of compromise is binding unless it is expressly stated to be made without prejudice; but, by the weight of authority, both in England and in this country, an offer, which is plainly one of compromise, is presumed to have been made without prejudice. Admissions of independent facts, made during negotiations to effect a compromise, are binding, unless made for the purpose of the compromise, and it is fairly to be implied that they are not to be used to the prejudice of the party who makes them.

CHAPTER VI.

LAW AND FACT.

§ 1. **The general rule.**—Questions which arise in actions at law are questions of law, questions of fact, and mixed questions of law and fact. As a general rule, questions of law are decided by the court, and questions of fact by the jury. Mixed questions of law and fact, under proper instructions of the court, are decided by the jury.

§ 2. **Questions of law in civil cases.**—In *civil* cases, the rule is universal, both in England and in this country, that questions of law are decided by the court.

§ 3. **Questions of law in criminal cases.**—In *criminal* cases, questions of law, according to the rule which obtains in the English and in the federal courts, and in the great majority of the state courts, are also decided by the court. In a few states, however, including Indiana, Maryland and Louisiana, owing to constitutional provisions, and Illinois and Connecticut, owing to statutory provisions, questions of law, as well as of fact, are decided by the jury.

§ 4. **Matters which constitute questions of law.**—The term "questions of law," as used in this chapter, means questions which are decided by the court, as contradistinguished from questions which are decided by the jury. In reality, however, the term, in its broad sense, includes certain questions of *fact*. Thus, the admissibility of testimony offered in evidence, and the competency of persons to act as witnesses, are preliminary questions of *fact* for the court to decide.

While it would be quite impracticable, in a work of this kind, to attempt to enumerate all matters which constitute questions of law, to mention some of the principal ones will doubtless be found of service. Under this head are included the following: The positive law, which includes the constitution, the statutes, the law of nations, the law merchant, and the common law; the construction, interpretation,

and legal effect of judicial records and other legal documents and writings; the construction, interpretation, and legal effect of oral agreements when the facts are undisputed; the materiality of facts, as affecting rights and liabilities; the meaning of words, when used in their ordinary sense; the sufficiency of the evidence to justify allowing the jury to render a verdict upon it, or, to justify allowing a verdict which has been rendered to stand; the essential acts which constitute the due execution of a valid will; the existence or nonexistence of want of probable cause in an action for malicious prosecution; what constitutes negligence; whether certain undisputed acts constitute negligence; whether certain articles could, under any circumstances, constitute "necessaries"; whether a certain offer amounts to an offer of compromise or not; whether a writing is a sealed instrument or not; the materiality of the defendant's evidence, for the giving of which he is on trial for perjury; the jurisdiction of the court; the construction and effect of pleadings; the rules which govern in ascertaining the amount of damages in an action for negligence; the reasonableness of a certain rule, act, or condition, when the facts relating to it are undisputed; all questions which arise in a suit in equity; all questions which arise in an action at law, whether civil or criminal, when a jury is waived.

§ 5. **Withdrawal of the case from the jury.**—Cases sometimes arise in which the court is justified in withdrawing them from the jury. In some of them the court is entitled to exercise a discretion in the matter, while in others it is bound to withdraw them. This function is one which should be exercised only in very clear cases. It should never be exercised when the evidence, if material, is conflicting; nor, when impartial minds might honestly and reasonably draw different conclusions therefrom. If the facts are undisputed or admitted, whether such facts constitute a legal cause of action, or a legal defence, is a question of law for the court to decide. To justify a withdrawal of the case from the jury, on the request of one of the parties, the evidence of the opposite party must be assumed to be true, and all legitimate inferences therefrom must be in his favor. A mere scintilla of evidence, in support of any theory of the case, is not of itself sufficient to prevent a withdrawal. If at the close of the plaintiff's case, there is

no evidence at all to prove a material fact essential to recovery, the court, on the request of the defendant, is bound to instruct the jury to find a verdict for the defendant. If, however, such request is not made until after the defendant has introduced evidence which tends to prove such material fact, the court may refuse to so instruct the jury. Where there is any material evidence tending to prove all the material requisites to a recovery the trial judge is bound to submit the case to the jury without regard to what at the time, he may think he would do on a motion for a new trial. If the verdict rendered is wholly unsupported by the evidence, the higher court, on appeal, will reverse the judgment below, and render judgment in accordance with the evidence. The question of withdrawing the case from the jury may be raised by a motion for a nonsuit, by a demurrer to the evidence, or by a request for an instruction to find a verdict for a particular party.

§ 6. **Matters which constitute questions of fact.**—Matters of fact, as previously stated, are questions for the jury to decide. Their number is legion, and mention is made in this section of only a few. In all cases where the evidence is conflicting, a question of fact is raised for the jury; and even when the evidence is not conflicting, if impartial minds might honestly and reasonably draw different conclusions therefrom, a question of fact is presented for the jury. Inferences drawn from other facts are peculiarly within the province of the jury. The credibility of witnesses; the sufficiency of corroborating evidence, where such evidence is required; the weight of evidence; the existence, nature, or condition of a person or thing; the terms of an oral contract, where the evidence is conflicting; the age, mental or physical capacity or condition, of a person; whether a person had knowledge, or notice, of a certain thing; a person's motive, intent, or belief; whether he entertained malice; the relations existing between persons; whether certain liquor is intoxicating or not; whether certain stains are bloodstains, and whether they were made by human blood or not; whether certain animals were diseased; are all questions of fact for the jury to decide.

§ 7. **Matters which constitute mixed questions of law and fact.**—Mixed questions of law and fact always involve ques-

tions of fact for the jury to decide, under proper instructions by the court. A question which is purely one of fact requires no instructions by the court. The distinction between these two classes of questions is this: In the case of a mixed question of law and fact, the subject matter of the question is within the definition of some rule of law; and, for this reason, possesses certain attributes other than those possessed by it naturally. In consequence of this fact, the court is called upon to instruct the jury as regards the legal definition of the term. On the other hand, the subject matter of pure questions of fact has its natural meaning, without being governed by rules of law, and therefore no occasion arises for instructions by the court. For the reason stated, the following matters are mixed questions of law and fact: whether a certain instrument is a deadly weapon; whether a certain piece of real estate constitutes a homestead; whether a certain article is baggage; whether the title to a piece of real estate has been acquired by adverse user; whether certain articles, under certain circumstances, are "necessaries"; whether a husband has abandoned his wife; whether a certain article is a fixture; whether an offer to dedicate land to a city has been accepted; whether an insurance company has waived a breach of condition in a certain policy; whether a principal has ratified his agent's unauthorized act; whether delivery has been made of certain articles of freight; whether, in the use of its private way by the public, a railway company has acquiesced; whether the plaintiff, in crossing defendant's tracks, exercised the degree of care imposed upon him by law; whether, in an action against a common carrier, a rule or regulation of the defendant company is a reasonable one; whether a certain punishment inflicted by a teacher upon his pupil was reasonable; whether a certain act, performed on Sunday, was one of necessity or charity; whether a rawhide is a proper instrument for the punishment of school children; whether a homicide was committed in self-defense; whether a debtor disaffirmed within a reasonable time an account rendered; whether the delay by a common carrier in the delivery of goods was reasonable or unreasonable; whether, in an action against a fire insurance company to recover the amount of loss by fire, due diligence was exercised in notifying the company of the loss, where a provi-

sion of the policy required the assured to give *immediate* notice of any loss; what constitutes a reasonable time and opportunity for a passenger on a train to call for his baggage and remove it; the seasonableness of the demand and notice to charge an indorser, in an action on a promissory note; whether, in an action against a common carrier for the value of lost baggage, certain tools of the plaintiff constitute proper baggage for a watchmaker or jeweler.

CHAPTER VII.

DEMURRERS TO EVIDENCE.

§ 1. **Definitions.**—A Demurrer to Evidence is a declaration by one of the parties to an action or suit, usually by the defendant, that he refuses to proceed because the evidence offered by the opposite party is insufficient to maintain the issue. The party who makes the declaration is called the Demurrant. The party against whose evidence it is made is called the Demurree.

§ 2. **Their origin and use.**—Demurrers to evidence are of ancient origin. They have been recognized in England from the earliest times, but have been practically obsolete in that country since near the close of the eighteenth century. In this country they have always been recognized, but their use has been very rare. In some states they are not allowed at all. In the Western and Southern states they are still used to some extent, but outside of these States they are practically unknown. Their rarity is owing to the fact that the purpose they serve can be adequately accomplished by other methods which are not so cumbersome, dilatory, expensive and hazardous.

§ 3. **Their purpose and effect.**—The purpose of a demurrer to evidence is to withdraw from the jury the facts, and have the court determine their legal sufficiency. Its effect, in addition to this, provided there is joinder by the opposite party, is an admission, on the part of the demurrant, of all the facts which the evidence tends to prove, and all inferences which the jury might logically and reasonably have drawn from such facts. Forced and arbitrary inferences, however, are not admitted. If the evidence demurred to is *prima facie* insufficient, and the burden of the issue is not upon the demurrant, the demurrer should be sustained and judgment entered in favor of the demurrant. If the burden of the issue is upon the demurrant, the issue cannot be decided in his favor merely on the demurrer. If there is some evidence on each material point of the issue, the demurrer should be overruled and judgment entered in favor of the demurree. If the evidence demurred to

is such as to warrant the trial court to set aside a verdict in favor of the demurree, on the ground that it is unsupported by the evidence, the demurrer should be sustained. If the evidence demurred to is conflicting, only that which is against the demurrant is considered by the trial court. If the demurrant has put in any evidence, it is deemed waived, but if the demurrer is overruled, and the demurrant puts in evidence, a higher court, in reviewing the ruling, will consider all the evidence. If the court errs in overruling the demurrer, and the demurree introduces more evidence, and thereby establishes the issue in his favor, the court's erroneous ruling is cured. Since a demurrer to evidence has nothing to do with the admissibility of the evidence, all of that demurred to is conclusively deemed to be competent; but demurring to the evidence will not cure erroneous rulings by the trial court as to the admissibility of certain parts of it. When there is a variance between the pleadings and proof, it may be taken advantage of by demurring to the evidence. In all cases where a demurrer to the evidence is submitted, and the opposite party joins, the function of the court is to apply the law to the facts.

In a suit in equity, a demurrer to the evidence has the same effect as in an action at law. In criminal cases, the same holds true, where this method of procedure is allowed; but, in this class of cases, demurrers to evidence are exceedingly rare. Some courts, which permit their use in civil cases, refuse to do so in criminal cases. Other courts permit their use in criminal cases if both parties consent; while some others hold that with such consent, the matter rests in the discretion of the court.

According to the common law doctrine, upon a demurrer to the evidence and joinder by the demurree, the trial ends, and the jury are discharged. The demurrer is thereupon entered of record to be subsequently argued and decided by the court in banc, whose judgment thereon is final, subject, of course, to review by a higher court. In modern practice, however, the trial judge passes upon the demurrer, and if it is overruled the case proceeds, and a verdict is rendered by the jury.

§ 4. **Joinder in demurrer.**—A joinder in demurrer is always essential to obtain a judgment on the demurrer. Formerly, the court would not compel a joinder, but according to the later practice it will if the evidence is definite and clear. If the

evidence demurred to is matter of record, or other matter in writing, the court will compel a joinder. If it is oral, or circumstantial, the court will not compel a joinder, unless the demurrant admits upon the record all the facts and inferences which the evidence demurred to tends to prove. This latter rule also obtains if the evidence is partly oral and partly written. If, before joinder, the demurrant seeks to withdraw his demurrer, the matter rests in the discretion of the court.

§ 5. **Form and substance of the demurrer.**—A demurrer to evidence, according to the early rule, and also according to the present rule, at least in most of the states, must be in writing. In some states, including Illinois, the whole evidence is not set forth in the demurrer, but merely the facts deducible from the evidence. In other states, if the evidence is written, it must be set forth *in haec verba;* and if oral, or circumstantial, not only must the evidence be stated, but also the facts which such evidence conduces to prove. In two states,—Virginia and West Virginia,—all the evidence on both sides is inserted in the demurrer.[1]

§ 6. **Proceedings in a higher court.**—In taking a case before a higher court for review, the writing, incorporating the formal demurrer and the matters of fact, should be transcribed on the minutes of the court. They thus become part of the record. A demurrer to evidence, according to the general rule, cannot be made a part of the record by a bill of exceptions. In Illinois, however, the contrary has been held.[2] Upon reviewing the case, and finding ground for reversal, the higher court usually reverses the judgment below and awards a *venire facias de novo.* In some cases, however, after reversal it will enter such judgment as should have been rendered by the court below. The usual grounds for reversal are, improperly refusing to compel a joinder, and improperly sustaining or overruling the demurrer. If the error is harmless, an erroneous refusal to compel a joinder is not ground for a reversal.

§ 7. **Analogous proceeedings.**—Owing to the fact, as previously stated, that more desirable and efficient proceedings are

1—Old Dominion Cotton Mills, 82 Va., 140; Nuzum v. Pittsburgh, etc., Ry. Co., 30 W. Va., 228.

2—Crowe v. People, 92 Ill., 236.

available, demurrers to evidence are comparatively very rare. Among these proceedings are the following: (1) Motion to nonsuit the plaintiff; (2) Motion to instruct the jury that, admitting plaintiff's evidence to be true, he cannot recover; (3) Motion, after plaintiff has rested his case, to exclude his evidence from the jury; (4) Motion to set aside the verdict on the ground that it is unsupported by evidence; (5) Submitting the case to the jury on an agreed statement of facts.

PART II.

LEADING PRINCIPLES AND RULES OF EXCLUSION.

CHAPTER I.

FACTS EXCLUDED ALTHOUGH LOGICALLY RELEVANT.

§ 1. **Relevancy.**—The term "relevant," as defined by Stephen, "means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or nonexistence of the other."[1]

Testimony, to be admissible, must be logically relevant. This is the chief basis of its admissibility. Much, however, which is logically relevant, is inadmissible. Some is excluded because too remote, and for this reason immaterial; some because comparatively unimportant for some other reason; some because too conjectural, and for this reason tends to mislead the jury; and some because it tends to multiply and complicate the issue, and thereby confuse the jury. That which is admissible is said to be *legally* relevant. Facts in issue are facts which are essentially involved in the decision of a cause; and evidence of their existence or nonexistence is legally relevant. Facts not in issue, but which are logically relevant to a fact in issue, and which, if true, conclusively establish the existence or non-existence of such fact, or, of any fact which is legally relevant to such fact, are themselves legally relevant. If, however, such facts merely render more or less probable the existence or nonexistence of such fact, their admissibility, as a general rule, rests in the sound discretion of the court.

§ 2. **Subsequent acts of precaution.**—In an action for damages, for injuries caused by the alleged negligence of a party, subsequent acts of precaution by the defendant in repairing

1—Stephen's Dig. Ev., Art. 1.

the defects which caused the injuries, or, in adopting additional safeguards to prevent the recurrence of injuries, are inadmissible. They may constitute indicative evidence, and justify suspicion by pointing a finger, but they are too conjectural to be given to the jury. They are liable to create a prejudice in the minds of the jurors against the defendant, are calculated to mislead them by distracting their minds from the real issue, and have no legitimate tendency to prove any negligence on the part of the defendant prior to such injuries. Such acts are also inadmissible on the ground of public policy; for, to admit them in evidence, would be virtually holding out an inducement for continued negligence. Whether the defendant was guilty of negligence or not, he would be apt, if a careful man, as a measure of precaution against future injuries, to cure the defect; and the fact that he does so has no legitimate tendency to show that he had knowledge of its existence when the injuries occurred. In the language of Baron Bramwell, "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before."[2] In England, the rule is well settled that such evidence is inadmissible. In this country, the same rule quite generally obtains. In Pennsylvania, however, such evidence is held admissible to show defendant's negligence,[3] and in Kansas to show previous defective condition, but not to show knowledge of such condition on the part of the defendant.[4]

§ 3. **Similar acts of defendant which cause injuries to others.**—As a general rule, similar acts of a party, which cause injuries to third persons, are inadmissible against him. This rule is applicable both to civil and criminal cases. To a certain extent, such acts are logically relevant; but they are too conjectural, and therefore too liable to mislead the jury, to be

2—Hart v. L. & Y. Ry. Co., 21 Law Times, N. S., 261, 263.

3—McKee v. Bidwell, 74 Pa. St., 218, 225.

4—Harter v. Ry. Co., 55 Kan., 250, 257.

legally relevant. Then again, although the acts are similar, the circumstances surrounding them are different, and for this reason the issues are multiplied and the jury the more liable to be confused. When, however, an act forms part of a series of similar acts, and the question is, whether such act was intentional, negligent or accidental, evidence of such acts is deemed legally relevant. When a party is charged with the commission of a certain crime, the fact that he has committed other crimes of a like nature is, as a general rule, inadmissible. If, however, the question is as to his guilty knowledge, motive, intent, or mental or physical state, at the time the crime charged was committed, evidence of such other crimes is deemed legally relevant to show such fact.

§ 4. **Injuries caused to others by the same act.**—Where third persons, under similar circumstances, sustain similar injuries to the plaintiff, from the same negligent act, the fact of such injuries is strong circumstantial evidence and legally relevant. It is logically relevant because it tends to show that the injury in question resulted from such negligent act. It is legally relevant because the surrounding circumstances are similar, and therefore the evidence is not too conjectural. The particulars of such injuries, however, are inadmissible. This is owing to the fact that such evidence would complicate the issue, and thus tend to confuse the jury.

§ 5. **Proof of the value of land by sales of other similar land in the vicinity.**—When the question in issue is the value of a particular piece of land, evidence as to what other similar land in the vicinity sold for, near the time at which the value of the land in question is to be determined, should be excluded. Such sales may have depended upon a variety of circumstances, and the jury would have to know them to determine the weight of such evidence. To put such collateral facts in issue would complicate the case, and thus tend to confuse the jury. The decisions upon this question, however, are not harmonious. In Illinois, Massachusetts, Wisconsin and New Hampshire, the courts hold that such evidence is admissible. In New Jersey, Pennsylvania, California and Georgia, the courts hold the contrary. The most appropriate evidence in such cases is the opin-

ions of persons competent to judge of such value. In some jurisdictions, however, such evidence is held inadmissible.

§ 6. **Methods and appliances adopted by others as a standard of comparison.**—A negligent act consists in a failure to exercise due care. Due care implies the exercise of reasonable diligence. What constitutes reasonable diligence depends upon the circumstances of the particular case. The circumstances of different cases vary. Besides, the usual practice, in cases similar to the one in question, may fall short of reasonable diligence in the eye of the law. Hence, as a general rule, the methods and appliances adopted by others, in similar cases, are inadmissible as a rule of conduct to govern the jury. To this general rule, however, there are some exceptions. Cases arise where the interests involved are so extensive and varied, or the business carried on so hazardous, that an essential of due care in conducting such lines of business, is the use of the most approved methods and appliances. With such methods and appliances, jurors are usually unfamiliar, and therefore, on the grounds of necessity and justice, such evidence, in these special cases, is held admissible.

CHAPTER II.

CHARACTER.

§ 1. **Definitions.**—Character, in its exact and strict sense, is the peculiar inherent quality, or aggregate of qualities, impressed by nature, habit or education, by which a person or thing is distinguished from others. General reputation is the character *imputed* to a person or thing by the public, in the community in which he or it[1] lives. In short, character is what a person or thing really is; whereas, general reputation is what a person or thing seems or is supposed to be, by the general public.

§ 2. **Application of terms.**—Although the terms character and general reputation have a decided difference of meaning, in the law of evidence they are often used synonymously. By a peculiar rule of evidence, when character is in issue, proof of it, as a general rule, is limited to evidence of general reputation. Direct evidence of the character itself is excluded. The general reputation is a species of circumstantial evidence from which an inference is drawn as to the real character in issue. In a few classes of cases, however, evidence of particular acts, and also of personal opinions, is held legally relevant.

§ 3. **The general rule.**—Notwithstanding the fact that evidence of the character of the parties to the litigation may throw a strong light upon the issue, and justify a strong inference, this class of evidence is usually excluded. The chief reasons for this are: (1) Danger of prejudice on the part of the witness; (2) Danger of the jury giving it undue weight; and (3) Complicating the case by collateral issues which tend to confuse the minds of the jury. To this general rule, however, there are exceptions.

§ 4. **The rule in criminal cases.**—Evidence, by the prosecution, of the bad character of the accused, in the first instance, is inadmissible. As a favor to the accused, however, to give him every chance to rebut evidence of his guilt, he is permitted to in-

1—See Wormsdorf v. Detroit Ry. Co., 75 Mich., 472, where the general bad reputation of a *horse*, for being unsafe, was in issue.

troduce evidence of his good character. Originally, this favor was extended only in capital cases; but later, the privilege was made applicable to all crimes. It is restricted, however, to strictly criminal cases. If the accused exercises this privilege, the prosecution may rebut the evidence of his good character by introducing evidence of his bad character. In all cases, however, the accused must first open the door by introducing evidence of his good character before the prosecution can introduce evidence of his bad character. Failure on the part of the accused to exercise his privilege raises no presumption adverse to him, nor are unfavorable comments on it by the prosecution allowable.

Character-evidence is circumstantial evidence, and its weight depends upon the circumstances of the particular case. As a general rule, it is not considered strong evidence. On the other hand, it is not a mere makeweight to be given consideration only in doubtful cases, but a substantial fact to aid in determining the question in issue. If the evidence of good character is sufficient to turn the scale and raise a reasonable doubt as to the defendant's guilt, it is conclusive in his favor.[2] The weight of such evidence does not depend upon the grade of the crime; but, in determining the degree of guilt of the accused, such evidence may be considered; and some courts, including those of Illinois, permit its consideration in mitigation of punishment.

2—"There is no case in which the jury may not, in the exercise of sound judgment, give a prisoner the benefit of a previous good character. . . . . Evidence of good character is not only of value in doubtful cases, and in prosecutions for minor offenses, but is entitled to be considered when the crime charged is atrocious and also when the testimony tends very strongly to establish the guilt of the accused. It will sometimes of itself create a doubt when without it none would exist." Per Allen, J., in Remsen v. People, 43 N. Y., 6.

"Good character is an important fact with every man, and never more so than when he is put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases where it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character. . . . . Good character may not only raise a doubt of guilt which would not otherwise exist, but it may bring conviction of innocence. In every criminal trial it is a fact which the defendant is at liberty to put in evidence; and, being in, the jury have a right to give such weight as they think it entitled to." Per Cooley C. J. in People v. Garbutt, 17 Mich., 9.

In homicide cases, the character of the *deceased,* as a general rule, is not in issue, and, in such cases, evidence of his general reputation for having been a dangerous and violent man is excluded; but, when the evidence tends to show that the accused committed the homicide in *self-defence,* under a reasonable apprehension of danger, or, when the nature of the killing is in doubt and the evidence wholly circumstantial, such evidence is held admissible.

In rape cases, the character of the prosecutrix for chastity is in issue on the question of her consent to the act, and evidence of her general reputation for want of chastity is admissible.

In seduction cases, one of the essentials of the crime is the previous chastity of the prosecutrix, and evidence of her general reputation for unchastity is always admissible.

In criminal prosecutions for assault and battery, evidence of the general reputation of the prosecuting witness, for being a quarrelsome and violent man, is inadmissible, except in those cases where the defendant's plea is self-defense. But evidence of the general reputation of the defendant, for being a peaceable and law-abiding citizen, is always admissible.

§ 5. **The rule in civil cases.**—In civil cases especially, character-evidence, pertaining to the litigants, is usually excluded. However just the inference may be from this class of evidence, as regards the merits of the case, such inferences are considered to be too vague and unreliable to justify the admission of such evidence. To this general rule, however, there are exceptions.

When, from the nature of the case, the character of a person is one of the main facts in issue, evidence of such fact is admissible. In an action for libel or slander, the injury to the plaintiff's character is the gist of the action, and evidence of his character is legally relevant. In an action for seduction, or criminal conversation, the chastity of the woman is a main fact in issue, and evidence of her general reputation for unchastity is legally relevant. In an action for breach of promise of marriage, the woman's chastity may be a main fact in issue, in which case evidence of her general reputation for unchastity is legally relevant. In an action for malicious prosecution, want of probable cause is a main fact in issue, and evidence of the plaintiff's general

reputation is admissible, not only to rebut evidence of this main fact, but also to mitigate the damages.

§ 6. **Particular acts as evidence of character.**—Evidence of particular acts, to prove character, is, as a general rule, inadmissible. Such evidence would introduce collateral issues, which would prolong and complicate the case, thereby unduly increasing the costs, and confusing the minds of the jury. Besides, such evidence is too conjectural, and for this reason liable to mislead the jury. In a few exceptional cases, however, this class of evidence is held admissible. Thus, in an action for rape, want of consent on the part of the woman is a main fact in issue; and, to rebut evidence of this fact, not only is evidence of her general reputation for unchastity admissible, but also evidence of previous specific acts of immoral intercourse with the defendant. Some courts go farther than this, and admit evidence of her previous acts of immoral intercourse with men other than the defendant. Again, in an action for seduction, or criminal conversation, the character of the woman for chastity is in issue, and some courts hold that, not only may her general reputation for unchastity be put in evidence, but also previous specific acts of immoral intercourse with other men.

§ 7. **General reputation.**—As previously stated, the usual method of proving character is by evidence of general reputation. General reputation is a fact and not hearsay. It is an evidentiary fact which can be testified to only by witnesses who have personal knowledge of it. Particular reports and rumors, in regard to it, are not admissible. What certain other persons, or classes of persons, say concerning it is hearsay, and inadmissible. Evidence of general reputation as to *the act charged* is inadmissible. Thus, in a larceny case, the general reputation of the accused that he committed the offense charged is inadmissible. On the other hand, evidence of general reputation to be admissible must have some reference or analogy to the trait involved. Thus, in actions involving personal violence such as felonious homicide, rape, robbery, assault and battery, evidence of the good character of the accused should be restricted to his general reputation for peace and quietude. In prosecutions for rape, seduction or criminal conversation, character-evidence of the woman should be restricted to evidence pertaining to her chas-

tity. In perjury cases, the only trait involved is veracity, and character-evidence of the accused should be restricted to his general reputation for telling the truth. In some jurisdictions, however, the courts are more liberal and allow evidence of general bad character. Another restriction on this class of evidence is, it is limited to the person's general reputation, in the community in which he resides or has intercourse, within a reasonable time of the act in respect to which it is material.

§ 8. **Personal opinion of character**—As a general rule, the personal opinion which one entertains of the character of another is inadmissible. Besides the danger of personal prejudice on the part of the witness, such evidence is altogether too conjectural to be given to the jury. To this general rule, however, there is an exception, a discussion of which is given in the next succeeding section. In addition to this exception, a few courts hold that, in cases involving personal violence, the disposition of the accused for peace and quietude can be shown as well by the personal opinion of a witness, who had opportunties for forming a just estimate as to this matter, as by general reputation.

§ 9. **Character of witness for veracity.**—Character-evidence of a party to the litigation, and character-evidence of a witness for veracity, are so separate and distinct that they should be carefully distinguished. In the former case, character is either a fact in issue or an evidentiary fact to the fact in issue. In the latter case it is neither, but merely a fact which comes into the case in a purely collateral way. It does not pertain to the truth or falsity of the fact in issue, but merely to the weight of the evidence of the particular witness.

When the veracity of a witness is sought to be impeached, the impeaching witness, after stating the general reputation for veracity of the witness who is sought to be impeached, may be asked his personal opinion. If the opinion is that the veracity of the witness is bad, counter evidence may be given to sustain such witness. The impeaching evidence, by the great weight of authority, must be restricted to the question of veracity; but, in a few jurisdictions, the rule is more liberal, and evidence is allowed of general bad character.

CHAPTER III.

CONFESSIONS.

§ 1. **Definition.**—Confessions are acknowledgments of guilt, made at any time or place, by persons accused of crime. They are limited to the criminal acts themselves, and are not applicable to acknowledgments of facts which merely tend to establish guilt. The latter are only criminating admissions.

§ 2. **Classification.**—Confessions are divided into two classes: (1) Judicial Confessions; (2) Extra-judicial Confessions. They are also divided into the two classes: (1) Voluntary Confessions; (2) Involuntary Confessions.

§ 3. **Judicial confessions.**—Judicial confessions are those made in the due course of legal proceedings before the committing magistrate, or in court. Such confessions are sufficient in themselves upon which to found a conviction, even in capital cases.

§ 4. **Extra-judicial confessions.**—Extra-judicial confessions are those made elsewhere than before the committing magistrate, or in court; and are not sufficient in themselves upon which to found a conviction, but must be corroborated by other evidence of the *corpus delicti.*

§ 5. **Voluntary confessions.**—Voluntary confessions are those made spontaneously, and not caused by any inducement of fear or favor held out to the accused by a person in authority, and having reference to the criminal charge. The important feature of a confession which renders it admissible is the fact that it was made voluntarily.

§ 6. **Involuntary confessions.**—Involuntary confessions are those induced by fear of punishment, or hope of reward, held out to the accused by a person in authority, and having reference to the criminal charge; or, by a threat of mob violence, or the infliction of actual violence by a private person. Such confessions are excluded, not because of any wrong done to the

accused owing to the mode of obtaining them, but because of their unreliability owing to the inducement.

§ 7. **Burden of proof.**—When a confession is offered in evidence, the burden, according to the weight of authority, is upon the prosecution to prove that it is a voluntary one. Some courts, however, including those of Massachusetts, put the burden upon the defendant to prove the contrary. Whether it is voluntary or not, is a preliminary question of fact for the court to determine. The weight to be given it is a question of fact for the jury to decide.

§ 8. **Nature and requisites of the inducement.**—An express promise, of immunity from prosecution, or amelioration of punishment, made by one in authority, renders the confession involuntary, and therefore, inadmissible. A mere admonition to tell the truth, and which does not amount to a recommendation to confess guilt, does not. A promise of some collateral benefit, independent of the criminal charge, or an appeal to the spiritual hopes or fears of the accused, will not render his confession involuntary; nor the fact that it was induced by artifice or fraud; nor the fact that the accused, at the time he made it, was handcuffed, or imprisoned, or in custody illegally, or not warned by the officer; nor the fact that it was made in response to a question which assumed the prisoner's guilt; nor the fact that the officer who had him in charge was armed; nor the fact that the confession, if extra-judicial, was made under oath. Nor will fear, produced by knowledge of being under suspicion, or by being accused of crime, render the confession involuntary. The inducement must be an external influence, and not arise from within; but it will be sufficient if only slight. A confession antecedent to the threat or promise, or made after the threat or promise has been withdrawn, is not involuntary. An inducement to confess one crime will not render a confession of a different crime involuntary. When one confession is made, induced by a threat or a promise, subsequent confessions of the same nature, though made to different persons, are presumed to have been induced by the same influence; and the evidence required to rebut this presumption must be clear and convincing. If, however, the threat or promise is made to the accused by one party, and no confession is made by the accused until after-

wards, and then to a different party, no such presumption arises. A confession inadvertently made under a mistake of fact is inadmissible.

§ 9. **A person in authority.**—A person in authority is one who has the right, owing to the relation which exists between him and the accused, to make assurances of favor to the person confessing, or to cause, or influence, the threatened injury. Any person officially connected with the prosecution is a person in authority. According to the English rule, the person injured is usually named as prosecutor; and owing to his official relation to the prosecution he is a person in authority. In this country, many of the state courts regard the injured party as a person in authority; but the federal courts do not. The prosecuting attorney, the magistrate connected with the prosecution, the sheriff or other officer having the custody of the accused, are persons in authority; but a magistrate, or other officer not connected with the prosecution, is not a person in authority. The party who offers the inducement may be the agent of one in authority. It is also sufficient, to render the confession involuntary, if the inducement is reasonably presumed by the accused to have been made by one in authority. The mere relation of master, mistress, or parent, to the accused, does not make the former a person in authority. Some courts hold that a confession induced by threats is involuntary though made by one not in authority. That one induced by threats of mob violence is involuntary, is well settled.

§ 10. **Confessions made under oath, at a former trial or preliminary proceeding.**—Confessions made under oath, at a former trial, or before a grand jury, or at a coroner's inquest, or at any other preliminary examination, are admissible against the accused at a subsequent trial, provided they were freely and willingly made. Some courts hold that, when the examination relates strictly to the crime, a confession made by the accused under oath cannot subsequently be used against him, though freely and willingly made. By the great weight of authority, however, no distinction is made between a confession under oath, made at such an examination, and one made at an examination which does not relate strictly to the crime. If the accused, after asserting his privilege of refusing to testify, is

compelled by the court to do so, his confession is inadmissible. At common law, to render a confession voluntary, made by the accused at his preliminary examination, it was necessary to warn him that what he said might be used against him on his trial. By the statute of 11 and 12 Vict., ch. 42, a similar warning is necessary. In this country, statutes are in force, in some of the states, to the same effect; but, apart from statutes, the contrary doctrine obtains.

§ 11. **Criminating statements of facts.**—Mere criminating statements of facts, not amounting to confessions of guilt, are not subject to the restrictions that obtain in the case of confessions. They are mere admissions, or declarations against interest, and the rules which apply to admissions are applicable to them. A few courts, however, hold that proof of their voluntary character is essential to their admissibility. Implied admissions of the accused, based upon his conduct, are subject to the same rules which obtain in the case of criminating statements of facts.

§ 12. **Confessions made by the accused while he was asleep, or intoxicated.**—Confessions made by the accused while intoxicated are not inadmissible on this ground, unless his condition was such, at the time they were made, as to render him incapable of understanding what he said.

§ 13. **The accused entitled to have the whole of the confession introduced.**—When the prosecution introduces in evidence a confession, the accused is entitled to have the whole of what he said upon the subject introduced. Favorable statements by him are admissible as well as those unfavorable. The former, however, when introduced by the accused, are open to contradiction by the prosecution. When a witness hears or remembers only parts of a confession, such parts are admissible; and when he is unable to give the exact words, he may give the substance. If the confession implicates others besides the accused, the names of the others must be given, but the confession, as such, will be binding only upon the accused. When a confession is introduced against the accused, explanatory evidence on his part is always admissible.

§ 14. **The confession in writing.**—A confession may be

either oral or written. It may be in the handwriting of another. It is admissible in evidence if written by another and signed by the accused or even acknowledged by him to be true. A confession in writing is within the best evidence rule, and excludes an oral confession, unless a foundation is laid for its introduction by showing that, the written confession is lost or destroyed, or, by otherwise properly accounting for its non-production. This rule is applicable both to written confessions made in pursuance of statutory provisions, and those made in the absence of such provisions. A confession may be given in evidence by any competent witness to whom it was made, or by whom it was overheard. The identity of the accused, as the person who made the confession, may be established by showing that he was recognized by his voice.

§ 15. **The confession made by a person other than the accused.**—As a general rule, a confession is admissible in evidence only against the party who made it. A confession by one defendant is not admissible against his codefendant, though the crime is joint, and all are jointly indicted and tried, unless the crime was committed in pursuance of a conspiracy and the confession was made during the pendency of the unlawful enterprise, and in furtherance of its objects. A confession by one of the conspirators, made after the termination of the conspiracy, is admissible only against himself. A confession by a third party, that he alone committed the crime charged against the defendant, is not admissible in favor of the accused. Nor would such a confession be admissible, either as a dying declaration, or, as a declaration against interest by a person since deceased, though made by the declarant when in extremis, with all of hope of living gone, and the declarant's death occurred shortly after the confession was made; except that, in the case of the dying declaration, it would be admissible in favor of the accused, provided he was upon trial for the homicide of the declarant. The reason that such a confession is inadmissible as a dying declaration, except in the case stated, or, as a declaration against interest by a person since deceased, is owing to arbitrary limitations upon the admissibility of these two exceptions to the hearsay rule. These are discussed in chapters VIII. and XIII. of this volume. A dying declaration is inadmissible

unless the accused is upon trial for the homicide of the declarant. A declaration against interest, by a person since deceased, is inadmissible as such, unless the interest is of a pecuniary or proprietary nature. The restriction in the latter case, which was established by the House of Lords in 1844, is generally conceded to be wrong both upon principle and policy, and wholly in opposition to one's sense of justice. An acknowledgment by an agent, made within the scope of his agency, is binding upon his principal, both in criminal and in civil cases. When several defendants are jointly tried for the same crime, a confession by one of them, which implicates one or more of the others, is admissible against the party who made it, though it may result in prejudicing the jury against the others. In such a case, counsel for the other defendants should make a motion that the court instruct the jury as to its proper application and effect.

§ 16. **Weight and sufficiency of confessions.**—As previously stated, a conviction may be founded solely upon a judicial confession, but not upon one which is extra-judicial. In the latter case the confession must be corroborated. As regards the weight to be given confessions, both courts and text-writers are in hopeless conflict.[1] Much confusion has doubtless been caused by failing to discriminate between the confession as a proved fact, and the testimony given to establish it. Thus it is said that, "an oral confession should be received and examined with caution, owing to the fact that such testimony is hard to be con-

1—Foster says, "Hasty confessions, made to persons having no authority to examine, are the weakest and most suspicious of all evidence." Foster, High Treason, c. III., sec. 8.

Blackstone says, "Even in cases of felony at the common law, they (confessions) are the weakest and most suspicious of all testimony." 4 Blk. Com., p. 357.

Sir William Scott (Lord Stowell) says, "The court must remember that confession is a species of evidence which, though not inadmissible, is regarded with great distrust." 1 Hagg. Cons., 304.

This same jurist, however, in a case decided a few months later, says, "I need not observe that confession generally ranks high, or I should say, highest in the scale of evidence." 2 Hagg. Cons., 315.

Eyre, C. B., says, a confession, freely and voluntarily made, 'is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt." 1 Leach, 263.

tradicted, and liable to be incorrectly reported and to be untrue, because of the influence of hope or fear exerted upon the prisoner."[2] An oral confession, however, which has been conclusively established, is entitled to as much weight as it would be if it were in writing. The inherent quality of a confession, and the ground of its admission in evidence, are the same, whether the confession is oral or written. Its weight, however, if the confession is oral, will depend very much upon the weight to be given to the evidence put in to establish it. As a general rule, confessions, whether oral or written, which have been voluntarily and deliberately made, and clearly and satisfactorily proved, are deserving of the highest credit.

§ 17. **Facts discovered as a result of an involuntary confession.**—Facts discovered as a result of a confession are admissible in evidence though the confession is involuntary. The reason is, the ground for excluding such a confession, viz., its unreliability, owing to the inducement offered, is not applicable to such facts. Not only are such facts admissible in evidence, but also the fact that they were discovered as a result of the confession, thereby showing defendant's knowledge of their existence, from which fact an inference of his guilt may be drawn. Thus, the discovery of stolen goods, or the disposition made of the body of a murdered person, or any other material fact, is admissible in evidence, though such fact results from an involuntary confession; and also that such fact was discovered as a result of the confession.

2—Elliott on Evidence, vol. I, 454; State v. Jefferson, 77 Mo. § 296; State v. Duffy, 57 Conn. 136; Com. v. Doughty, 139 Pa 525; Com. v. Reynolds, 122 Mass. St. 383.

CHAPTER IV.

HEARSAY EVIDENCE.

§ 1. **Definition.**—Hearsay evidence is evidence which depends solely for its truth or falsity, in the first instance, upon the statement or conduct of some person other than the witness, and has, in and of itself, no evidentiary force.[1]

§ 2. **Application of the term.**—The term "hearsay evidence" has a technical meaning. It is not restricted to *oral statements*. It is also applicable to written statements, and to conduct.[2] It is, however, strictly limited to *testimonial* assertions. On the other hand, an assertion is not hearsay merely because it is made by a *third* party. Such an assertion may constitute original evidence, and, as such, be legally relevant. The fact that a statement is under oath is immaterial. Such a statement may be hearsay, or, it may be, of course, original evidence.

§ 3. **The general rule, and reasons therefor.**—As a general rule, hearsay evidence is inadmissible. The principal reasons for

1—Dr. Greenleaf defines hearsay evidence as "that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person." Greenl. on Evid. (16th ed.), vol. 1, § 99.

Some other authors give substantially the same definition. It is submitted, however, that it is altogether too broad. It includes many classes of evidence which have no concern at all with the rule against hearsay. See Chamberlayne's Best on Evid. (8th ed.), p. 444.

2—In the celebrated case of Wright v. Doe d. Tatham, 7 Adol. & Ell., 313, which is so frequently cited, Baron Parke, in his opinion, says that, the *conduct* of the family or relatives of a testator, in taking the same precautions in his absence as if he were a lunatic; his election, in his absence, to some high and responsible office; the *conduct* of a physician, who permitted a will to be executed by a sick testator; the *conduct* of a deceased captain, on a question of seaworthiness, who, after examining every part of a vessel, embarked in it with his family; would all be mere instances of hearsay evidence,—mere *acts* or statements not on oath, but implied in, or vouched by, the actual *conduct* of persons by whose *acts* the litigant parties are not to be bound.

the rule are: (1) The original statement was not made under the sanction of an oath; (2) The party against whom it was made had no opportunity to cross-examine the original party who made it: (3) The jury had no opportunity of observing the demeanor of such party while making it. Other reasons are: (4) The original statement may have been imperfectly heard by the witness, or have been misunderstood, or inaccurately remembered, by him; (5) As the danger of prosecution for perjury is materially lessened, the witness may intentionally pervert it; and, (6) Such evidence introduces collateral issues which unnecessarily prolong the trial and increase the costs, and also tend to mislead and confuse the jury.

To this general rule there are important exceptions. Some of these, however, are only apparent; but, in most cases they are real. The dividing line between these two classes is not always clear. In the text-books and reports, much confusion exists on this point.[3] Thus, several classes of declarations which are treated by Phillipps, Wharton and Best as real exceptions to the rule against hearsay, are treated by Greenleaf as original evidence.

The subject of hearsay evidence is an exceedingly important one. Most of it, however, consists of exceptions to the rule against such evidence.

3—"This part of the subject presents an instructive spectacle of confusion, resulting from the desire, on the one hand, to hold to the just historical theory of our cases; and, on the other, to resort to first principles, without being aware of the size and complexity of the task which is thus unconsciously entered upon." Thayer's Prelim. Treat. on Evid. (1898), p. 523.

CHAPTER V.

APPARENT EXCEPTIONS TO THE RULE AGAINST HEARSAY.

§ 1. **The making of the statement a principal fact in issue.**—When a principal fact in issue is the *making* of a statement, and not its truth or falsity, evidence of such statement is original evidence and not hearsay. The gist of the distinction is the use of such statement other than as a *testimonial* assertion. Thus, in an action for slander or libel the principal fact in issue is the *making* of the statement, and evidence of this fact is original evidence.

§ 2. **The making of the statement circumstantial evidence of a fact in issue.**—When the *making* of a statement tends materially to prove a fact in issue, evidence of such fact is usually treated as original circumstantial evidence and not hearsay. Thus, in an action for malicious prosecution, a statement by a third party to the defendant, which tends materially to prove that the defendant had probable cause for prosecuting the present plaintiff, in the former action, is original circumstantial evidence and not hearsay.

§ 3. **General reputation.**—A person's character, when material, is usually established by evidence of his general reputation. Such evidence, in a sense, is circumstantial evidence. The *basis* of the general reputation is hearsay, but the general reputation itself is a *fact*, and the evidence of such fact is original evidence and not hearsay.

§ 4. **Market values.**—What are commonly known as market values are capable of proof. The usual medium of such proof is market reports contained in newspapers and other periodicals which regularly contain records of current commercial transactions. The basis of such reports is sales, and offers to sell, made in open markets regularly attended by buyers and sellers. Such reports are regularly accepted and acted upon as trustworthy by the commercial world generally. For this reason, and also because of their practical convenience, they are very

generally held legally relevant. They constitute statements of third persons, and are based upon hearsay, but, in the technical sense of the term, they themselves are not hearsay, but original evidence.

§ 5. **Statements indicating intention, motive, or state of mind.**—When evidence of the statement of a person is introduced solely to show the intention, motive, or state of mind, of such person, at the time such statement was made, the statement is regarded as a *verbal act*, from which such intention, motive, or state of mind may be inferred, in the same way as from the appearance of the person, or from his behavior generally. When, therefore, such intention, motive, or state of mind, is material to the question in issue, evidence of such statement is legally relevant. Some courts, however, including those of Illinois, reject such evidence, unless the statement is contemporaneous with the act done to which it relates.[1] The courts of Massachusetts formerly entertained the same view,[2] but they now hold the contrary.[3] Upon principle, the modern Massachusetts view is correct.

1—Chic. Ry. Co. v. Chancellor, 165 Ill., 438; Siebert v. The People, 143 Ill., 571.

2—Com. v. Felch, 132 Mass., 22.

3—Com. v. Trefethen, 157 Mass., 180.

CHAPTER VI.

REAL EXCEPTIONS TO THE RULE AGAINST HEARSAY.

§ 1. **Origin and scope.**—Real exceptions to the rule against hearsay constitute a large and important part of the law of evidence. Some of these so-called "exceptions," however, are, in fact, independent rules, whose origin antedates that of the general rule against hearsay, which had its origin in the development of the modern jury system. Thus, dying declarations, in homicide cases, have always been admissible; and so have certain classes of documentary evidence, including ancient writings, entries in public registers, shop-book entries, and entries made in the regular course of business by persons since deceased.

As regards the scope of these exceptions, there exists in the law much confusion. The reason for this is two-fold: (1) Some courts construe the rule against hearsay liberally, and the exceptions to the rule strictly;[1] while other courts do exactly the opposite;[2] (2) some courts, as well as some authors, treat certain classes of declarations as original evidence, which some others treat as hearsay. Upon principle, a general rule should be construed liberally, and exceptions to it strictly. The true basis of much of the confusion probably consists in the opposite views which exist as regards what *in reality* constitutes the rule and what the exception. "A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible."[3]

§ 2. **The principal classes of real exceptions to the rule against hearsay.**—The principal classes of these exceptions are as follows: (1) Reported testimony, and certain declarations under oath; (2) Dying declarations; (3) Declarations relating to pedigree; (4) Declarations relating to matters of public or gen-

1—Lord Blackburn, in the leading case of Sturla v. Freccia, 5 App. Cas. 623.

2—Sir George Jessel, in Sugden v. St. Leonards, 1 Prob. Div. 154.

3—Thayer's Prelim. Treatise on Evid. p. 522.

eral interest; (5) Public documents; (6) Ancient documents, ancient possession, and other ancient matters; (7) Declarations against interest by persons since deceased; (8) Account-books of the parties to the litigation; (9) Entries and declarations of third parties, made in the regular course of duty or business; (10) Declarations relating to the physical or mental condition of the declarant; (11) Declarations relating to or forming part of, the *res gestæ*.

These various classes of exceptions are next discussed, in the order given, a chapter being devoted to each class.

CHAPTER VII.

REPORTED TESTIMONY, AND CERTAIN DECLARATIONS UNDER OATH.

§ 1. **Classification.**—Declarations under oath, which are legally relevant, are of two classes: (1) Evidence given at a former trial or proceeding; (2) Depositions made in pursuance of statutory provisions for the purpose of a particular trial.

§ 2. **Evidence given at a former trial, or proceeding.**—This class of evidence forms a real exception to the rule against hearsay. It is well to observe, however, that two, of the three chief reasons for excluding hearsay, are absent. The original statement was made under oath; and, upon that occasion, the adverse party had the opportunity to cross-examine the declarant. This class of declarations is admissible under the following conditions: (1) The original declarant must be dead; or, physically or mentally incapable; or, kept away by the adverse party; or, out of the jurisdiction of the court, or his whereabouts unknown; (2) The questions in issue, in both proceedings, must be the same; (3) The parties, in both proceedings, must be the same; (4) The party against whom the evidence is offered must have had the right and opportunity, in the former of the two proceedings, to cross-examine the declarant.

§ 3. **Disabilities of the original declarant.**—The death of the original declarant is almost universally held to be a sufficient disability in all cases, both criminal and civil, to render the declaration legally relevant; and the insanity of the original declarant, or his loss of memory by disease or old age, is very generally treated, in this connection, as the equivalent of death. Absence from the jurisdiction is also held, by a majority of the courts, as a sufficient disability, both in criminal and civil cases. A merely temporary absence, however, is not sufficient. It must be for a prolonged or uncertain time. A few courts, which recognize it as a sufficient disability in civil cases, refuse to recognize it as such in criminal cases, owing to their interpretation of the constitutional provision, which requires that the

accused shall be permitted to meet the witnesses against him face to face.[1] A few other courts refuse to recognize it in any case.[2] Blindness of the declarant is not, as a general rule, a sufficient disability; but, in regard to some classes of evidence, it may be.[3] Mere loss of memory, as a general rule, is not a sufficient disability. The former testimony, however, may be read by the witness to refresh his memory.[4] When testimony given at a former trial is offered in evidence, on the ground that the declarant is without the jurisdiction of the court, or cannot be found, preliminary evidence, satisfactory to the court, tending to show due diligence to obtain the personal attendance of the witness, is essential.

Whether evidence, given at a former trial, by a witness who has since become disqualified by reason of some inherent change in his condition, such as, for example, becoming infamous, is legally relevant, the courts do not agree. According to the better view, however, such evidence is admissible.[5] Upon principle, it would seem that the *admissibility* of such evidence should depend upon the condition of the witness when it was given, and that his subsequent conduct should affect only its *weight*. If the subsequent disqualification results from some statutory enactment, instead of some inherent change in the condition of the witness himself, the former testimony is legally irrelevant.[6] If the witness is kept away by the connivance of the adverse party, his evidence given at a former trial is admissible.

§ 4. **The questions in issue the same.**—To render evidence given at a former trial admissible, the questions in issue at both trials must be the same. It is sufficient, however, if they are *substantially* the same. In both trials the evidence must be directed at, and relate to, substantially the same points. It is

1—State v. Houser, 26 Mo., 431, 439; Bergen v. People, 17 Ill., 426, 65 Am. Dec. and note; Finn v. Com., 5 Rand (Va.), 701; Collins v. Com., 12 Bush, (Ky.), 271; Pitman v. State, 92 Ga., 480; People v. Newman, 5 Hill, 296.

2—Berney v. Mitchell, 34 N. Y., 341; Crary v. Sprague, 12 Wend., 45.

3—Houston v. Blythe, 60 Tex., 509.

4—Stone v. Ins. Co., 71 Mich., 81; Ruch v. Rock Island, 97 U. S., 693.

5—See note to Le Baron v. Crombie *et al.*, 14 Mass., 233.

6—Eaton *et al.* v. Alger *et al.*, 47 N. Y., 345.

not essential, however, that the nature of the actions be the same. Thus, in the one case the action may be replevin, and in the other trover.

§ 5. **The parties the same.**—It is also a qualification to the admissibility of this class of evidence that the parties to both proceedings be the same. It is not essential, however, that they be literally identical. It is sufficient if the parties to the second trial are identified in interest with the parties to the former one, either as privies in blood, in law, or in estate. Thus, an ancestor and his heir are privies in blood; a testator and his executor, or an intestate and his administrator, are privies in law; and a grantor and his grantee are privies in estate; and, in each of these cases, the two parties come within the meaning of the term *same parties*. But a tenant for life and the remainderman do not, since they are not privies, as the one does not derive his title from the other. The fact that the plaintiff in the former trial is the defendant in the subsequent one is immaterial.

§ 6. **The right to cross-examine the witness at the former trial.**—The right to cross-examine witnesses is a fundamental prerequisite to the validity of all evidence. The chief purpose of the constitutional right given the accused to confront the witnesses against him is to secure the opportunity to cross-examine them. It follows, therefore, that evidence given at a former trial is legally irrelevant if the party against whom it was given was precluded from cross-examining the witness. Mere failure to exercise the right is immaterial; but the right, and the opportunity to exercise it, must both exist. If the right to cross-examine is not exercised, the opportunity to do so must clearly appear; and, if the right is exercised, that it was on behalf of the party against whom the witness testified, must clearly appear. If, for any reason, the witness, after giving direct evidence, is rendered incapable of being cross-examined, such direct evidence, at the subsequent trial, is legally irrelevant.

It may be well to observe, in this connection, that it is the necessity of an adequate and fair opportunity of cross-examination which constitutes the basis of the rules which require that the parties to the two actions, and the questions in issue in each, be substantially the same.

§ 7. **Mode of proving former testimony.**—Any person, who is a competent witness, and who heard the former testimony, may give it in evidence. Notes of such testimony may be used, to refresh the memory of the witness, and, under certain conditions, as proof of the testimony itself. Where the purpose of the notes is merely to *refresh* the *present* recollection of the witness, it is immaterial by whom, or when, they were made. If, however, their purpose is to *prove* the former testimony, it must appear that they were made contemporaneously with the giving of such testimony; and it is also essential that they be verified, and adopted by the witness as a record of *past* recollection.[7] Neglect on the part of some courts to properly observe this distinction has resulted in confusion.

The notes of the court stenographer may be used, of course, to refresh the memory of the witness. In most jurisdictions, based upon statutes or rules of court, they are admissible to prove their contents. The mere notes themselves constitute a hearsay report of the testimony, and, for this reason, are treated in some jurisdictions as legally irrelevant.[8] On the other hand, they are made in the course of official duty, and, under the principle of this exception to the rule against hearsay, are, in most jurisdictions, made admissible by statute or rule of court. When such notes are properly authenticated by the stenographer, and adopted as a record of past recollection, they are admissible to prove their contents.[10]

Notes taken by the trial judge are no part of the record, nor is the act of taking them part of his official duty. As a general rule, therefore, they are inadmissible to prove their contents.[11] In some cases, however, where both actions are tried before the same judge, such notes have been held legally relevant, on the ground of necessity.[12]

A bill of exceptions, according to the better view, is inad-

7—Kankakee Ry. Co. v. Horan, 131 Ill., 288; Stern v. People, 102 Ill., 540.

8—1 Greenleaf on Evid. (16th ed.), §§ 439a, 439b.

9—Toohey v. Plummer, 69 Mich., 345.

10—Jackson v. The State, 81 Wis., 127.

11—Foster v. Shaw, 7 Serg. & Rawle, 156; 1 Greenleaf on Evid. (16th ed.), § 166.

12—R. v. Gazard, 8 C. & P., 595; 1 Greenleaf on Evid. (16th ed.), § 166.

missible to prove testimony given at a former trial.[13] Some courts, however, hold the contrary.[14]

Formerly it was esential, in proving testimony given at a former trial, that the witness repeat the precise words. According to the modern rule, however, the *substance* of the *testimony* is sufficient; but the witness must state the substance of the whole of the testimony, and not merely that of part of it. This general rule is applicable to both criminal and civil cases alike. In a few states, including Massachusetts and New York, the substance of the *language* is essential.

§ 8. **Extension of the general rule.**—In some jurisdictions, there is a tendency to extend the application of the rule which recognizes the admissibility of testimony given at a former trial to certain preliminary proceedings. The character of the judicial tribunal is not of vital importance. Thus, an arbitration is a judicial proceeding, and the rule has been held applicable to such a case, as well as to a technical action at law. In all cases, however, it is essential that the parties and the issues, in the former proceeding, be the same as those in the subsequent one, and a fair and adequate opportunity be afforded for cross-examination.

§ 9. **Depositions.**—The taking of depositons, and their use as evidence, are matters which rest largely upon statutory provisions. As in the case of evidence given at a former trial, to render them admissble, the parties, and the questions in issue, must be the same, and the right and opportunity of cross-examination must exist. The latter, however, may, of course, be waived. When depositions are to be taken on behalf of one of the parties, the other party is entitled to proper notice, in order that he may exercise his right to cross-examine. If the notice is applicable to two or more depositions, to be taken at different places at the same time, the party receiving the notice may elect which one he will attend; and, if he attend one of them, only that one can be used in evidence against him. If, however, he fails to attend any, he thereby waives his rights at all, and all the depositions are admissible against him.

13—Kankakee Ry. Co. v. Horan, 131 Ill., 288; Stern v. People, 102 Ill., 540; Ill. C. Ry. Co. v. Ashline, 171 Ill., 313.

14—Bank v. Lacy, 1 Monroe (Ky,). 7; Wilson v. Noonan, 35 Wis., 343; Coughlin v. Haenssler, 50 Mo., 126.

CHAPTER VIII.

DYING DECLARATIONS.

§ 1. **Definition.**—Dying Declarations are statements of material facts, relating to the cause and attendant circumstances of the declarant's own homicide, made by him while *in extremis*, and while under the fixed belief and moral certainty that his death is impending and certain to follow almost immediately.

§ 2. **Grounds of admissibility.**—For admitting this class of hearsay evidence, two reasons have been assigned; neither of which, however, is wholly satisfactory. One of these is the solemnity of the occasion upon which the declaration is made. The other is the public necessity of the case. The importance of the former of these two reasons has been emphasized frequently. The contemplation by the declarant of his impending death is deemed a guarantee of the truth of the declaration equivalent to that of the sanctity of an oath. As stated by Lord Chief Baron Eyre, "they are declarations made in extremity, when the party is at the point of death, and when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice."[1] This reason, however, is an arbitrary, rather than a logical, one. There are other grounds for excluding hearsay evidence besides the want of the sanctity of an oath. The accused has the right to cross-examine the witnesses against him, and the jury have the right to observe their demeanor while testifying. Then again, dying declarations are restricted to homicide cases only. The latter of the two reasons stated above, although not strictly logically applied, is the better one of the two. In homicide cases it frequently happens that there is no eye-witness of the deed other than the murderer and his victim; and the latter is dead. To prevent

1—Greenleaf on Evid., vol. I., § 156; People v. Corey, 157 N. Y., 332, 347.

manslayers from escaping justice through lack of evidence, public necessity demands that their victim's dying declarations be admitted in evidence against them. If, however, there are available eye-witnesses of the deed, this reason for admitting dying declarations ceases to exist; and, to be strictly logical, the declarations should be excluded. In practice, however, such is not the rule.

§ 3. **Constitutionality of this exception to the hearsay rule.**— On the ground that the accused is not allowed to meet the witnesses against him face to face, the constitutionality of this exception to the hearsay rule has not been free from attack. It has been sustained, however, so many times, that it is no longer an open question. In support of its constitutionality three arguments have been advanced. One is, that the accused is allowed to meet face to face the witness who gives in evidence the dying declaration, and that the *declarant* is not the "witness" whom the accused is constitutionally entitled to meet "face to face." Another is, that notwithstanding the fact that Magna Charter substantially provides that witnesses against the accused shall be examined in his presence, at common law dying declarations have always been held admissible; and, in view of this fact, the constitutional provision, which entitles the accused to meet the witnesses against him face to face, is not to be interpreted so as to repudiate dying declarations. Still another argument is, that since dying declarations are admissible *in favor of* the accused, as well as against him, to exclude them might operate very much against his interest; and therefore, to hold them unconstitutional might result in interpreting the constitutional provision so as to deprive him of an important right.

The first of the three arguments, stated in the last paragraph, is somewhat mythical, to say the least; and it has frequently been criticised. Napton, J., in his able opinon in State v. Houser, 26 Mo., 431 (bot. p. 437), in criticising it, says: "To say that the witness who must meet the accused 'face to face' is he who repeats what the dying man has said, is a mere evasion. . . . It is the dying man who is speaking through him whose evidence is to have weight and efficacy sufficient, it may be, to take away the prisoner's life. The living witness is but a conduit pipe—a mere organ through whom this evidence is conveyed to the court

and jury." In the same opinion, in support of the second argument, stated above, he says: "But dying declarations, made under certain circumstances, were admissible at common law, and that common law was not repudiated by our constitution in the clause referred to, but adopted and cherished." In support of the third argument, stated above, Thayer, J., in State v. Saunders, 14 Oregon, 300, says: "But the right to offer that character of proof (dying declarations) is not restricted to the side of the prosecutor; it is equally admissible in favor of the party charged with the death. The objection to it, therefore, might, if sustained, operate very injuriously to an accused, and the clause in the bill of rights, if construed as the counsel contended it should be, have the effect to deprive the latter of an important right." Of these three arguments the second is the strongest one, and the one most generally approved.[2]

§ 4. **Essentials of admissibility.**—The admissibility of dying declarations depends upon the existence of the following conditions: (1) The declarant must be dead; (2) He must have been competent to make the declarations; (3) He must have actually been *in extremis* when he made them; (4) He must have been conscious at that time of his impending death; (5) The subject of the inquiry must be his own homicide, and the subject of the declaration must be the cause of his own homicide and its attendant circumstances.

§ 5.—**Competency of the declarant.**—To be admissible in evidence, dying declarations must have been made by persons who would be competent as witnesses, if living. Thus, at common law, atheists, persons who have been convicted of infamous crimes, and persons mentally incapable, are incompetent witnesses; and therefore, at common law, the dying declarations of such persons are inadmissible. By statute, however, in many jurisdictions, atheists and convicts have been made competent witnesses; and, in those jurisdictions, their dying declarations, when within the other requisites indicated in the next preceding section, are admissible. Again, the dying declarations of very young children have been excluded on the ground that had they been living they

2—Hill v. Com., 2 Gratt. (Va.), (Mass.), 434; Jackson v. State, 81 607; Com. v. Richards, 18 Pick. Wis., 127.

would have been incompetent witnesses. The same principle is also applicable to the dying declarations of intoxicated persons. If they were so drunk as to be practically unconscious, they would, if living, be incompetent witnesses; and, for this reason, their dying declarations would be inadmissible. If, however, they were conscious, although intoxicated, they would, if living, be competent witnesses; and, therefore, their dying declarations would be admissible. In the latter case, the declarants' intoxication might affect the weight of their declarations, but not the admissibility of them. Still another illustration of the application of this principle is the case of dying declarations of a husband or wife. If the declarant would have been a competent witness, if living, his or her dying declarations are admissible. Thus, in an action against a husband for personal violence to his wife, the wife is a competent witness; therefore, in a prosecution of a husband for the murder of his wife, the wife's dying declarations are admissible.

§ 6. **Declarant in extremis, and conscious thereof.**—Dying declarations to be admissible must have been made while the declarant was actually *in extremis*, and also while he was conscious of his impending death. That is, he must actually have been at the point of death, and also have completely abandoned all hope of living. Both of these conditions are essential. A mere fear, on his part, that he will not recover, is insufficient. The slightest hope of recovery will render the declarations inadmissible. Nor is it sufficient that he believed that he would *never* recover. It is essential that he believed in his almost immediate dissolution. It is not essential, however, that his death occurred almost immediately. He may have lived for days, or even weeks, after making the declarations, and the declarations still be admissible.[3] The fact that he lived a considerable length of time, after making the declarations, may tend to show, however, that they were not made under a sense of impending death. Dying declarations, which were made when all hope of recovery was abandoned, are not rendered inadmissible by a subsequent hope of recovery; and declarations, which were made when some hope

3—In Titus v. State, 117 Ala., 16, the declarant lived several weeks after making the declaration; and in State v. Crane, 120 N. C., 601, five months; and in both cases the dying declarations were held admissible.

of recovery was entertained, are rendered admissible by a subsequent ratification when all hope of recovery has been abandoned. Dying declarations are not inadmissible merely because they are contradictory. The fact that they are contradictory may affect their weight, but not their admissibility.

§ 7. **Mode of proving declarant's consciousness of his impending death.**—The declarant's consciousness of his impending death must be established by affirmative evidence. This evidence may be either direct, or circumstantial, or both. As a general rule, it is both. Statements by the declarant, which tend to establish the fact, are admissible, and may in themselves be sufficient; but they are not necessarily conclusive. On the other hand, statements by the declarant, expressing an opinion that he would recover, may be successfully overthrown by circumstantial evidence, inferred from surrounding circumstances which establish beyond doubt that his real belief was to the contrary. This belief may be inferred from the nature of the declarant's injuries, or state of illness; or from his conduct or deportment; or, from statements made to him by medical or other attendants, expressing an opinion that his death was inevitable, and that no hope of recovery could be entertained.

§ 8. **Nature and scope of dying declarations.**—The textbooks on evidence of a century ago, including McNally (1802), Swift, the first American treatise (1810), and Phillipps (1814), stated that dying declarations were generally admissible in both civil and criminal cases. According to the modern rule, however, which is well settled, both in England and in this country, they are admissible (excluding a few statutory exceptions) in homicide cases only; and, in these, only when the declarant's own homicide is the subject of inquiry, and the cause of it and the attendant circumstances, the subject of the declaration.

In abortion cases, the dying declarations of the victim, at common law, are inadmissible. This is owing to the fact that her death is not an ingredient of the offense. By statute, however, in some jurisdictions, her death is made an ingredient of the offense; and, in these jurisdictions, her dying declarations are admissible. In a few states, including New York and Massachusetts, statutes have been passed which expressly provide

that in prosecutions for abortion, the woman's dying declarations are admissible.[4]

It sometimes happens that two or more homicides result from the same act; and the question may then arise, whether the dying declarations of one of the victims are admissible or not, when the accused is on trial for the murder of another of the victims. Upon this point the authorities are in conflict. By the weight of authority they are probably excluded. Some courts, however, both in England and in this country, have sustained the contrary view, which, upon the whole, seems to be the better and more sensible one of the two.

Dying declarations, to be admissible, must be statements of facts, and not mere expressions of opinon. A few courts, however, when the opinion declaration is in favor of the accused, relax the rule which excludes opinion dying declarations, and hold them admissible.[5] To do this, however, is illogical.

Since the identity of the person who committed the homicide, is a material circumstance pertaining to the act, the dying declarations of the victim are admissible to prove this fact; and, for a similar reason, they are admissible to prove the identity of the declarant.

Vague and indefinite dying declarations are inadmissible. Nor are declarations admissible which are not in themselves complete. Thus, if the defendant was prevented by any cause from adding intended qualifications to his statements, his declarations are inadmissible. If, however, his declarations contain all he intended to say, and are not vague and indefinite, they are admissible, although they fall short of being a complete narrative of all that occurred.

It is not essential to the admissibility of dying declarations, that they show, in themselves, that the declarant had given up all hope of recovery. This fact may be established by extrinsic evidence.

The admissibility of dying declarations is not restricted to cases where the declarations are adverse to the accused. They are equally admissible when in his favor.

4—The New York statute was passed in 1875, and the Massachusetts statute in 1889. See Com. v. Homer, 153 Mass., 343.

5—State v. Ashworth, 50 La. Ann., 94; Haney v. Com. (Ky., 1883), 5 Crim. L. Mag., 47.

It has frequently been contended that, since the ground of admissibility of dying declarations is public necessity, when the necessity ceases to exist, the declarations should be excluded. Thus, it has been contended, that when there are disinterested eye-witnesses of the homicide available, the necessity for introducing the dying declarations disappears, and therefore the dying declarations should be excluded. This contention, however, is not sustained by the courts.

§ 9. **Form of dying declarations.**—The form in which dying declarations are made is immaterial. They may be made orally, or in writing, or merely by signs. They may be made under oath, or otherwise. They may be spontaneous, or made in response to leading questions. They may be written by the declarant himself, and subscribed by him; or, stated orally by him, in the hearing of another, who may take them down in writing, and then read them to the declarant, who, in turn, may assent to them by affixing his signature.

§ 10. **Mode of proving dying declarations.**—The mode of proving dying declarations depends upon the form in which they were made. If made in writing, and the writing was subscribed by the declarant, the writing is the best evidence, and must be produced or a proper foundation laid for the introduction of secondary evidence of its contents. It is immaterial who made the writing, provided it was understood by the declarant and subscribed by him. An oral dying declaration, taken down in writing by another, but not subscribed by the declarant may be proved by parol evidence. In such a case, the writing itself is inadmissible. It may be used, however, to refresh the memory of the witness. The fact that a dying declaration was reduced to writing, and subscribed by the declarant, does not preclude parol evidence of oral dying declarations which were made upon other occasions. As regards the declarations reduced to writing, however, the writing itself is the best evidence. Oral dying declarations may be proved by any competent witnesses who heard them. Dying declarations by signs may be made by squeezing the hand of the interrogator, or by nodding the head, etc.; and such declarations may be proved, of course, by parol evidence. In proving dying declarations, it is not essential that the witness be able

to give the precise words of the declarant. The substance of the declaration is sufficient.

§ 11. **Right to impeach or corroborate dying declarations.**—Dying declarations are open to impeachment by any evidence that would have been admissible to impeach the evidence of the declarant, given upon the witness stand, had he been living. Thus, impeaching evidence is admissible, that the declarant's general reputation for truth and veracity was bad; that he was an irreligious person, and did not believe in future punishment or reward; and, that he had made statements contradictory of his dying declarations.

After the accused has introduced evidence to impeach the dying declarations, the state may then introduce evidence to corroborate them.

§ 12. **Weight of dying declarations.**—As a general rule, dying declarations are of less weight than oral evidence given upon the witness stand, under oath. The reasons for this are the following: (1) The accused is precluded from cross-examining the declarant; (2) The jury are precluded from observing the demeanor of the declarant; (3) The mental and physical condition of the declarant may have been such as to militate against the accuracy of the declaration; (4) The witness who testifies to the declaration (if oral) may have incorrectly heard, or have inaccurately remembered, the declaration; (5) This witness, for testifying falsely in regard to the dying declarations, is less liable to prosecution for perjury, and for this reason is less likely to tell the truth. The weight to be given dying declarations depends largely upon their intrinsic probability, the candor and veracity of the declarant, and the fullness and fairness with which they are taken and reported. In all cases, they should be considered by the jury with the greatest deliberation. The modern tendency is practically universal to restrict them.[6] An instruction by the trial court, that dying declarations, given in evidence on the part of the state, are entitled to the same degree of credit as if testified to under oath on examination, is erroneous.[7]

6—10 Harvard Law Review, 518.

7—The State v. Mathes, 90 Mo., 571; The State v. Vansant, 80 Mo., 67; People v. Knapp, 148 N. Y., 631.

§ 13. **Preliminary evidence requisite, and mode of introducing it.**—The admissibility of dying decalarations, is, in the first instance, a preliminary question of fact for the court to determine. To admit them, the preliminary evidence should be clear and convincing. Whether such evidence should be given in the presence of the jury or not, is a question upon which the courts do not agree. Some courts hold that it is a matter which rests in the sound discretion of the court. Others hold that such evidence should be given, in the first instance, in the absence of the jury; and that, if it is given in the presence of the jury it is error, provided that, the dying declarations are excluded. Of course, if the dying declarations are admitted, the error, in giving the preliminary evidence in the hearing of the jury, would be cured. The better view is, that, in the first instance, the preliminary evidence should be given in the absence of the jury. If the dying declarations are held admissible, the preliminary evidence should then be submitted to the jury, to be considered by them in passing upon the credibility and weight to be given the dying declarations.

§ 14. **Burden of proof.**—When the testimony, offered by a witness upon the stand, is objected to on the ground of his incompetency, the burden of proof is upon the party objecting, to establish the incompetency. Analogous to this general rule, when the admission of dying declarations is objected to, the burden of proof is upon the objector.

§ 15. **Other declarations of deceased persons distinguished.**—Declarations, made by a party since deceased, may be inadmissible as dying declarations, and admissible on some other ground. Thus, declarations, which are inadmissible as dying declarations, may be admissible on the ground that they characterize and explain the act done, and were made contemporaneously with it; in other words, because they form a part of the *res gestæ*. They may also be admissible, under certain circumstances, on the ground that they were made in the presence of the accused;[8] or, on the ground that they were against his pe-

8—Declarations of taird persons, made in the presence and hearing of another person, which tend to affect his interest, may be given in evidence where the purpose is, to introduce his answer to such declarations, or, to prove a tacit admission of them; but this class

cuniary or proprietary interest. Dying declarations, on the other hand, do not have to be part of the *res gestæ*, nor made in the presence of the accused, nor do they have to be against the interest of the declarant.

of declarations should be received with great caution. Bouvier's Law Dictionary, vol. 1, p. 705.

CHAPTER IX.

DECLARATIONS RELATING TO PEDIGREE.

§ 1. **Definition.**—The term "pedigree," as used in the law of evidence, has a comprehensive meaning. It includes not only matters of descent and relationship, which are closely allied, but also the facts of birth, marriage and death, and the times and places of these events, either absolutely or relatively, when material to prove descent or relationship.

§ 2. **Grounds of admissibility.**—The primary ground of admissibility of this class of evidence is, knowledge and interest of the declarant, and little or no temptation, on his part, to state an untruth. As stated by Lord Chancellor Eldon, "Declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in bibles and registry books, all are admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth."[1] A secondary ground of admissibility is necessity of the case, to avoid a failure of justice.

§ 3. **Requisites of admissibility.**—The requisites of admissibility of this class of declarations are: (1) The declarant must be dead; (2) The declarant must have been qualified to speak; (3) The declaration must have been made *ante litem motam;* and, according to the English rule, (4) The declaration must relate to some question of pedigree involved in the issue.

§ 4. **Death of the declarant.**—Although a disability of the declarant equivalent to death (insanity for example), is, in several of the exceptions to the rule against hearsay, sufficient upon this point to render the declarations admissible, in the case of declarations relating to pedigree, the declarant, according to the general rule, both in England and in this country,

1—Whitelock v. Baker, 13 Ves., 514. See also Fulkerson v. Homes, 117 U. S., 389.

must be dead. A few courts, however, have recognized an equivalent disability as sufficient. Thus, it has been held, that the declarant's absence from the state is sufficient to meet this requirement.[2] As regards *family reputation,* it is not essential, as a general rule, that all the members of the immediate family be dead, to render the family reputation admissible. If, however, the family reputation relates to matters of recent occurrence, and some of the members of the family are available as witnesses, evidence of such family reputation is generally held inadmissible.[3]

§ 5. **Qualifications of the declarant.**—The declarant, according to the modern rule, must have been related, to the person concerning whom the declaration was made, either by blood or marriage. If by marriage, the English rule requires that the parties were husband and wife. In this country, however, the rule is generally given a more liberal interpretation. The early English rule, as stated by Lord Eldon, was as follows: "The tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely from their domestic habits and connections that they are speaking the truth, and that they could not be mistaken."[4] This rule, it is submitted, is, upon principle, sound; but, as heretofore stated, a less liberal one obtains, both in England and in this country, although some of the courts of this country sanction the rule given by Lord Eldon.

Personal knowledge of the declarant of the facts of the declaration is not essential. Declarations based upon hearsay are admissible, provided all of the declarants were qualified to speak.

The relationship of the declarant must be established by evidence *dehors* the declaration. Upon this point, however, sufficient evidence to establish a *prima facie* case is all that is required.

When the question in issue is the existence of relationship between the members of two alleged branches of a family, it

2—Campbell v. Wilson, 23 Tex., 252.

3—Harland v. Eastman, 107 Ill., 538.

4—Whitelock v. Baker, 13 Ves., 514.

is not essential, to render declarations pertaining to such relationship admissible, that the declarant be shown to have been related to both of the alleged branches of the family. Proof of his relationship to one of them is sufficient.

§ 6. **The declaration must have been made ante litem motam.**—A declaration relating to pedigree, like a declaration relating to a matter of public or general interest, to be admissible in evidence, must have been made *ante litem motam.* That is, it must have been made before any dispute arose over the matter in litigation. That it was made before the commencement of the suit, is not necessarily sufficient. If, however, it was made with the express purpose of preventing a dispute, it is admissible. The fact that the declarant was not aware of the controversy is immaterial.

§ 7. **The necessity for a question of pedigree to be involved in the issue.**—Upon this question, the decisions are not harmonious. In England, it has always been held, that one of the requisites of admissibility of this class of declarations is, that a question of pedigree be involved in the issue. This has been interpreted to mean "a case in which the controversy between the parties was, whether or not a certain line of genealogy could be established." The English rule has been followed by the federal courts, and also by the courts of several of the states, including New York, New Jersey, Missouri, Connecticut and California. In a majority of the state courts, however, a more liberal rule has been followed. According to this rule, it is not essential that the issue involve a question of pedigree. Upon principle, this rule, it is submitted, is the correct one. The test of the admissibility of the declaration should be its trustworthiness when made, and not the nature of the litigation in which it happens to be offered in evidence. As said by Bigelow, C. J., "Some of the authorities seem to limit the competency of this species of proof to cases where the main subject of inquiry relates to pedigree, and where the incidents of birth, marriage and death, and the times when these events happened, are directly put in issue. But, upon principle, we can see no reason for such a limitation. If this evidence is admissible to prove such facts at all, it is equally so in all

cases whenever they become legitimate subjects of judicial inquiry and investigation."[5]

§ 8. **Declarations pertaining to illegitimacy.**—Some courts hold that declarations pertaining to the illegitimacy of a child, by a member of the father's family, are inadmissible.[6] According to other courts, however, such declarations are admissible.[7] All courts hold that declarations pertaining to the illegitimacy of a child, by a member of the mother's family, are admissible.

§ 9. **Declarations pertaining to age.**—A person may testify to his own age. Some courts treat such evidence as original evidence, while others treat it as hearsay based upon family reputation. So, declarations pertaining to the age of a relative, made by a party since deceased, are admissible in evidence, when a question of pedigree is involved.

§ 10. **Declarations by husband and wife.**—Declarations of a husband, pertaining to his wife's family, and declarations of a wife, pertaining to her husband's family, are admissible. Even when the declarations are made subsequently to the dissolution of the marriage they are admissible, unless excluded for some special reason.

§ 11. **Declarations relating to particular facts of time and place.**—As stated in § 1 of this chapter, the term "pedigree," in its broad sense, includes not only matters of descent and relationship, but also facts of birth, marriage and death, and the times and places of these events. In the strict sense of the term, however, a person's age, and the time and place of his birth, marriage or death, are not, in themselves, questions of pedigree. They may, however, be so connected with questions of pedigree as to render declarations concerning them admissible in evidence. Formerly, much doubt was expressed as regards the admissibility of declarations relating to *place* of birth, marriage or death; but, according to the modern rule,

5—North Brookfield v. Warren, 16 Gray, (Mass.), 171.

6—Flora v. Anderson, 75 Fed. Rep., 217, 234; Crispin v. Doglioni, 3 Sw. and Tr., 44.

7—Northrop v. Hale, 76 Me., 312; 49 Am. Rep., 615; Jackson v. Jackson, 80 Md., 176; Tyler v. Flanders, 57 N. H., 618.

such declarations are equally admissible with those which relate to the time of either of these events.[8] It is essential, however, according to the rule which obtains in England, and in some American jurisdictions, that the facts to which the declarations pertain relate to some question of pedigree involved in the issue. But, according to the present view, which obtains in many American jurisdictions. "If this evidence is admissible to prove such facts at all, it is equally so in all cases where they become legitimate subjects of judicial inquiry and investigation."[9]

§ 12. **Form of the declaration.**—The form of the declaration is immaterial. It may be oral, or in writing. It may, indeed, consist in conduct or acts. Thus, the treatment of a son by his parents may amount "to a daily assertion that the son is legitimate."[10] Whether the declaration was made in a formal and solemn manner, or, in an informal manner, is immaterial.

§ 13. **Proof required of the genuineness of the declaration, when made in writing.**—As a general rule, the genuineness of a written declaration relating to pedigree must be established by affirmative evidence. This is done by showing that the declaration in question was either made by some member of the family, to which it relates, or, that it has been recognized as genuine by the members of that family. Entries in the family bible, and inscriptions on tombstones, monuments or

8—Greenleaf on Evid. (16th edit.), § 114 f. "Again it is argued that a man's age is one of the elements of his pedigree, and that, in proving pedigree, hearsay evidence is admitted. The argument is fallacious. It is true, the age of a person may become material in questions of pedigree; but even then the hearsay declarations of strangers, persons not related by blood or marriage, are inadmissible to prove it. Moreover, the present case involves no question of pedigree. The proof of age was not offered for the purpose of showing parentage or descent, both of which were impertinent to the issue between the parties."

Mr. Justice Strong (for the court) in Conn. Mut. L. Ins. Co. v. Schwenk, 94 U. S., 593, 598.

9—North Brookfield v. Warren, 16 Gray, (Mass.), 17, (pauper settlement); Cherry v. State, 68 Ala., 30, (selling liquor to a minor); Collins v. Grantham, 12 Ind., 444, (plea of infancy); Houlton v. Manteuffel, 51 Minn., 185, (plea of infancy); Fraser v. Jennison, 42 Mich., 206, 235, (will contest).

10—Berkely Peerage Case, 4 Camp. 416.

coffin plates, are presumed to be known to the members of the family, and to have been adopted as correct.

§ 14. **Weight of declarations relating to pedigree.**—The weight to be given to this class of declarations will depend upon the circumstances of each particular case. As a general rule, such declarations are to be received with considerable caution. The chief reasons for this rule are the following: (1) The family pride of the declarant may have induced him to make a biased statement; (2) Although a presumption exists that the declarant possessed knowledge of the facts pertaining to his own family history, it frequently happens that, as regards many of such facts, he did not; (3) Prejudice of the witness may cause him to give biased testimony; (4) Comparatively slight risk of punishment for testifying falsely may induce an unscrupulous witness to state untruths.

CHAPTER X.

DECLARATIONS RELATING TO MATTERS OF PUBLIC OR GENERAL INTEREST.

§ 1. **Definitions.**—Matters of public or general interest, in this connection, do not mean those which tend to gratify curiosity, or love of amusement or information, but those in which the people at large have a pecuniary interest which affects their legal rights or liabilities. The term "Public Interest" has a broader meaning than the term "General Interest." The former means an interest which concerns all the people of the State; while the latter means one which concerns only the people of a community or district.

§ 2. **Grounds of admissibility.**—The three grounds of admissibility of this class of declarations are the following: (1) The necessity of the case, owing to the fact that the legal rights and liabilities affected are often of ancient and obscure origin, and acted upon but seldom, in consequence of which direct evidence would seldom be available; (2) Knowledge of all the members of the community of the interest involved owing to its public or general nature; (3) The strong presumption that such declarations are true, owing to the fact that, had they been false, conflicting interests of other persons would naturally have resulted in contradictory statements.[1]

1—"The admissibility of declarations of deceased persons in such cases is sanctioned because these rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time; because direct proof of their existence, therefore, ought not to be required; because in local matters, in which the community are interested, all persons living in the neighborhood are likely to be conversant; because, common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if the statements were false; and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject." Lord Campbell, C. J., in Reg. v. Inhabitants of Bedfordshire, 4 El. and Bl., 535.

§ 3. **Requisites of admissibility.**—The requisites of admissibility are the following: (1) The declarant must be dead; (2) He must have had sufficient opportunity to gain knowledge of the matter of interest in question; (3) The declaration must have been made *ante litem motam;* (4) It must be community reputation, not merely individual opinion; (5) It must relate, according to English rule, to matters of public or general interest, as distinguished from those of a merely private interest.

§ 4. **Death of the declarant.**—Upon this point, the same rule obtains, as regards this class of declarations, that obtains in the case of declarations relating to pedigree. The declarant, at the time the declarations are offered in evidence, must be dead. An equivalent disability is not sufficient. It has been held, however, that absolute proof of the declarant's death is not essential, that *prima facie* proof is sufficient.

§ 5. **Opportunity for knowledge.**—In the case of declarations which relate to public interests, all the members of the public are presumed to possess knowledge of such interests, and proof of such knowledge is not required; but in the case of declarations which relate to general interests no such presumption of knowledge exists, and proof that the declarant was conversant with such interests is essential.

§ 6. **The declarations must be made ante litem motam.**—There are two exceptions to the hearsay rule in which the declarations must be made *ante litem motam.* These two exceptions are, declarations relating to pedigree, and declarations relating to public or general interests. The reason for this rule is, declarations which are made *post litem motam* are apt to be produced by interest, prejudice or passion, and in consequence be biased or untrue. The *lis mota* in this connection, means the origin of the controversy, and not necessarily the commencement of the suit. It is essential, however, that the controversy relate to the very point involved in the litigation concerning which the declarations are sought to be introduced. The fact that the declarant, at the time he made the declaration, had no knowledge of the controversy, is immaterial. This is because evidence of such fact is apt to be very difficult to produce, and also because the introduction of such collateral issues is apt to confuse the minds of the jurors.

§ 7. **The declarations must be community reputation, and not merely individual opinions.**—The declarations to be admissible must be in effect reputation-evidence, and not merely statements of an individual. Statements involving a community reputation, and statements involving mere individual credit, are widely different. The former are admissible in evidence, the latter are not. The distinction between these two classes of statements is clearly pointed out by Denman, L. C. J., in Regina v. Bliss, 7 A. & E., 550. Testimony was offered and objected to that one R. now deceased, had planted a willow tree in a certain spot to indicate the location of the boundary of the highway. In rejecting the testimony, Lord Denman said: "He does not assert that he has heard old people say what was the public road; but he plants a tree and asserts that the boundary of the road is at that point. It is the mere allegation of a fact by an individual. . . . That is, he knew it to be so from what he himself observed, and not from reputation."

§ 8. **Nature of the interest involved.**—The interest involved must be, according to the English rule, a public or general one. In very many cases it relates to the location of boundaries. All the courts agree that reputation-evidence is admissible to prove public boundaries. They also agree that such evidence is admissible to prove private boundaries which are coincident with public boundaries. According to the English rule, however, such evidence is inadmissible to prove boundaries which are strictly private; but, in this country, by the great weight of authority, it is admissible. The only states which reject it today are Maine and Massachusetts. The chief reasons why a more liberal rule obtains in this country than in England are, the fact that our system of survey is such that large tracts of land are divided and subdivided into farms whose boundaries are coincident in a measure with some common boundary; and the fact that the early settlers were very much interested in, and, in consequence, fully conversant with, such matters.[2] It

2—"In this country the admissibility of this kind of evidence * * * has been uniformly maintained when the tract originally surveyed was large, and was subsequently subdivided into numerous farms, the boundary of the original tract serving as a boundary of the several farms. In cases of this kind, the principal upon which the evidence (reputation-evidence) is received has been re-

is well settled, however, that reputation-evidence is inadmissible to prove matters of private concern other than boundaries.[3]

The interest involved, and the reputation offered in evidence, must both be of ancient origin. That is, their origin must be antecedent to living memory, and therefore incapable of proof by original evidence.[4] It is held by some courts, however, that antiquity is sufficient "without enquiring as to whether the parties . . . are living or dead."[5]

§ 9. **Particular facts.**—It is sometimes said that reputation-evidence is inadmissible to prove particular facts. Such a statement is misleading. A public boundary is a particular fact, and reputation-evidence is admissible to prove it. What is meant by the statement is, reputation-evidence is inadmissible to prove particular occasions of the exercise of the interest or right. Thus, reputation-evidence is admissible to prove the

garded as similar to that which relates to boundaries of a manor or parish." Field, C. J., in Morton v. Folger, 15 Cal., 279.

"Because we have not manors, shall we therefore lose the benefit of the rule which considers boundary as matter of reputation, and permits hearsay evidence of its locality? * * * If reputation is admissible to establish the boundaries of a manor because all the tenants of a manor are interested therein and naturally conversant about the boundary, and may be presumed to discourse together about it, what shall we say in the case of our wild lands, which were covered with early adventurers whose chief concern was to make themselves acquainted with the lines and corners of all around them? * * * Every one knows that such subjects were not only the familiar topics of conversation, but that they were the all-absorbing topics. I will venture to conjecture that for one discussion in private conversation about the boundaries of an English manor, there have been a hundred animated and interested debates about the situation of a corner tree in our western counties. I take it therefore that every motive for the admission of hearsay testimony as to boundary in case of a manor applies with equal force to its admission in questions of boundary with us." Tucker, P., in Harriman v. Brown, 8 Leigh, 708.

3—Peck v. Clark, 142 Mass. 436, 440; Roe v. Strong, 107 N. Y. 350.

4—"Reputation or hearsay, taken in connection with other evidence, is entitled to respect in cases of boundary when the lapse of time is so great as to render it difficult, if not impossible, to prove the boundary by the existence of the primitive landmarks or other evidence than that of hearsay." Baltzell, C. J., in Dagget v. Willey, 6 Fla. 511. See also, Clark v. Hills, 67 Tex. 152; Adams v. Stanyan, 24 N. H. 412 (maps).

5—Shutte v. Thompson, 15 Wall. 161.

location of a highway, but inadmissible to prove the use of it as such upon certain specific occasions.[6]

§ 10. **Necessity of proof of enjoyment of the interest or right.**—It was formerly held that proof of acts of enjoyment, within living memory, of the interest or right, was essential to the admissibility of declarations concerning it. The modern rule, however, is to the contrary.[7] Evidence of such acts of enjoyment is admissible, of course, and its weight will depend upon the circumstances of the particular case. It is also the rule that the witness is not required to state from whom he heard the declarations.

§ 11. **The declaration may deny the existence of the interest or right.**—The declaration which it is sought to introduce in evidence is admissible though it denies the interest or right claimed. Whether it affirms or denies it is immaterial.[8]

§ 12. **Form of the declarations.**—The form of the declarations is immaterial. They may be made orally or in writing. They may be contained in deeds or leases between individuals, or in verdicts, judgments or decrees of court. They may also be contained in historical treatises or in ancient maps.

6—"A witness may be permitted to state what he has heard from dead persons respecting the reputation of the right; but not to state facts of the exercise of it which the dead persons say they had seen." Peake's Evidence, 13 (1801).

"Such hearsay evidence (reputation-evidence) is safe, because if not true, it can be disproved by other evidence of the same kind. But even in these cases hearsay is restricted from being evidence of particular facts; because in such instances, although the evidence should be false, yet counter evidence could not be expected." Winter, C. J., in Cherry v. Boyd, Litt. Sel. Cas. 8.

See also, Nicholls v. Parker, 14 East. 331, in which case the court held that evidence of what old persons had said concerning the boundaries of the parishes and manors was admissible, but not what they had said as to particular facts or transactions concerning them.

7—Crease v. Barrett, 1 C. M. & R. 930; 1 Greenleaf on Evid. 130.

8—Drinkwater v. Porter, 7 C. & P. 181, 32 E. C. L. 486.

CHAPTER XI.

PUBLIC DOCUMENTS.

§ 1. **Definitions and classifications.**—The term "Document" has been defined as "any substance having any matter expressed or described upon it by marks capable of being read";[1] or, "any material substance on which the thoughts of men are represented by writing or any other species of conventional mark or symbol";[2] or, "any solid substance upon which matter has been expressed or described by conventional signs with the intention of recording or transmitting that matter".[3] Thus, a piece of paper on which words are written, printed, lithographed, stamped, or expressed by arbitrary signs or ciphers, is a document. So is a tally, or piece of wood with notches to represent figures or amounts.[4]

Documents are classified as follows: (1) Public Documents. (2) Quasi-Public Documents, and (3) Private Documents.

Public documents are classified with respect to their nature and also with respect to their mode and means of proof. As regards their nature they are (1) Official, and (2) Unofficial. As regards their mode and means of proof they are (1) of Record, and (2) Not of Record.

Official public documents are those made by, or under the direction of, public functionaries in the executive, legislative and judicial departments of government, including under this general head the transactions which public officials are required to enter in the books or registers in the course of their public duties, and which occur within the scope of their own personal knowledge and observation.[5] They include, state papers, legislative journals, judicial records, official registers, official reports, official certificates and

1—Stephen Dig. of Evid., Art. 1.
2—Best on Evid., § 215.
3—Sweet's Law Dictionary.
4—Sweet's Law Dictionary.
5—Am. & Eng. Enc. of Law, Vol. 9, p. 880.

municipal records. These documents are within the exception to the rule against hearsay, and are admissible in evidence.

Unofficial public documents include newspapers, and books of history, science and art. Under certain conditions such documents are admissible.

Quasi-public documents include the books and records of private corporations. As regards the shareholders themselves, such books and records are public documents, and as between them are admissible in evidence; but with respect to all other persons they are private documents and inadmissible.

Private documents include all those which are neither public nor quasi-public, and are not within the exception to the rule which excludes hearsay evidence.

§ 2. **Grounds of admissibility.**—The grounds of admissibility of public documents are as follows: (1) They are made by authorized and accredited persons appointed for that purpose; (2) Their publicity renders mistakes in them readily detected; (3) The party by whom they are made is a disinterested party, and therefore without any motive to falsify; (4) The necessity of the case, owing to the nature of their subject-matter; and (5) In many cases statutes expressly provide for their admission.

§ 3. **Limitations.**—Documents to be admissible in evidence under this exception to the hearsay rule must, of course, be pertinent to the issue. They must also be made by a public officer, whose duty it is to make them, and they must be intended for public inspection. Confidential reports made to the government by public officials are not public documents. On the other hand, documents to be public do not have to be intended for inspection by the whole world. As said by Lord Blackburn in a leading English case,[6] "it should be a public inquiry, a public document, and made by a public officer. I do not think that 'public' there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense

6—Sturla *et al.* v. Freccia *et al.*; 5 App. Cas. 623.

that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be 'public' within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it . . . but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards."[7]

§ 4. **State papers.**—State papers, including official proclamations and messages of the chief executive officer of the state or nation,[8] and official papers and books published by authority of Congress,[9] are public documents and admissible in evidence to prove the facts therein recited.

§ 5. **Legislative journals.**—Congressional and legislative journals are public documents and admissible in evidence to prove their contents.[10] The English courts, however, exclude particular facts contained in such documents which form no part of the congressional or legislative proceedings;[11] but the courts of this country admit such facts provided they relate to public matters.[12]

§ 6. **Judicial records.**—The records of judicial proceedings are public documents and admissible in evidence to prove the facts therein recited. Such facts may include the terms or effect of a judgment, the time when it went into effect, or collateral facts. Where the parties are the same, such records are admissible to establish a controverted fact which was in issue and which was determined by the judgment.

7—See also Evans v. Urban District, 1 Ch. Div. 241.

8—Rex v. Sutton, 4 M. & S. 532; Talbot v. Seeman, 1 Cranch (U. S.), 1.

9—Gregg v. Forsyth, 24 How. (U. S.) 179; Bryan v. Forsyth, 19 How. (U. S.) 334.

10—Spangler v. Jacoby, 14 Ill. 207; Grob v. Cushman, 45 Ill. 119; Watkins v. Holman, 16 Pet. (U. S.) 25.

11—Rex v. Oates, 10 How. St. Tr. 1079.

12—Watkins v. Holman, 16 Peters (U. S.) 25, 56.

§ 7. **Official records and reports.**—Official records and reports, made by a public officer whose official duty it is to make them, are public documents and admissible in evidence. Thus, records of births, marriages and deaths, required by law to be kept for public reference, are public documents and admissible.[13] And records which are kept in the discharge of a public duty are admissible in evidence though not required by statute to be kept. Thus, in a leading case in which a record kept by one in the employ of the United States Signal Service was objected to because no law authorized or required such record to be kept, the court say: "The record admitted in this case was not a private entry or memorandum. It had been kept by a person whose public duty it was to record truly the facts stated in it. Sections 221 and 222 of the Revised Statutes require meteorological observations to be taken at the military stations in the interior of the continent and at other points in the states and territories for giving notice of the approach and force of storms. The Secretary of War is also required to provide, in the system of observations and reports in charge of the signal officer of the army, for such stations, reports and signals as may be found necessary for the benefit of agriculture and commercial interests. Under these acts a system has been established, and records are kept at the stations designated, of which Chicago is one. Extreme accuracy in all such observations and in recording them is demanded by the rules of the Signal Service, and it is indispensable, in order that they may answer the purposes for which they are required. They are, as we have seen, of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure. They come, therefore, within the rule which admits in evidence 'official registers or records kept by persons in public office in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observation.' To entitle them

13—Murray v. Supreme Lodge, 74 Conn. 715.

to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty. Nor need they be kept by a public officer himself, if the entries are made under his direction by a person authorized by him. It is hardly necessary to refer to judicial decisions illustrating the rule. They are numerous."[14]

§ 8. **Official certificates.**—At common law, certificates by public officers are mere hearsay and inadmissible. In most jurisdictions, however, statutes exist which provide that the certificates of such officers are *prima facie* evidence of the facts properly recited therein. Thus, the certificate of a town clerk of the due publication of an ordinance is *prima facie* evidence of that fact;[15] and the certificate of the Secretary of State that a certain person has been recognized by the department of state as a foreign minister is *prima facie* evidence that he has been authorized and received as such by the President.[16]

§ 9. **Same. Not evidence of collateral facts.**—The certificates of such officers, however, are not evidence of facts as to which they are not authorized to certify. Thus, where an officer is authorized to certify merely to a record his certificate is inadmissible to prove collateral facts contained therein.[17] Nor is such certificate admissible to prove a statement contained therein as to the legal effect of such record.[18]

§ 10. **Municipal records.**—Municipal records, when properly authenticated, are admissible in evidence to prove the corporate acts therein recorded. Thus, a book of city ordinances, purporting to be printed and published by authority of the city, and signed by the mayor and attested by the secretary of the city, is admissible in evidence to

14—Evanston v. Gunn, 99 U. S. 660. See also People v. Dow, 64 Mich. 717; Chicago &c. Ry. Co. v. Trayes, 17 Ill. App. 136; Huston v. Council Bluffs, 101 Ia. 33.

15—Chamberlain v. Litchfield, 56 Ill. App. 652; Lindsay v. Chicago, 115 Ill. 120.

16—U. S. v. Benner, 1 Baldw. (U. S.) 234.

17—Milford v. Sherman, 21 Conn. 101; Daggett v. Bonewitz, 107 Ind. 276.

18—Enfield v. Ellington, 67 Conn. 459; Billingsley v. Hiles, 6 S. Dak. 445.

prove its contents.[19] And a city charter may be read as evidence from a book printed and published by authority of the common council.[20]

§ 11. **Unofficial public documents.**—Unofficial public documents include newspapers, books of general literature, of history, of science and art, almanacs, and mortality and tide tables.

§ 12. **Newspapers.**—Newspaper statements are usually mere hearsay and generally inadmissible. They are admissible, however, to prove facts of notice, publication, and the like; and they have been held admissible to prove current prices. Governmental gazettes are also admissible to prove public acts.

§ 13. **Books of general literature, of history, and of science and art.**—Books of general literature are usually inadmissible in evidence;[21] but they have been allowed in argument to illustrate and explain.[22] Thus, dictionaries and cyclopædias are inadmissible in evidence, but they may be referred to as an aid to the memory and understanding of the court.[23] General histories, whose authenticity has been established by reputation, are admissible to prove public and remote facts; but not to prove private facts, or particular usages and customs not of a general public nature.[24] The grounds for admitting histories in evidence to prove public and remote facts are (1) The necessity of the case, and (2) The facts to be established are properly subjects of history. Books of science and art are generally inadmissible. The

19—Lindsay v. Chicago, 115 Ill. 120.

20—Holly v. Bennett, 46 Minn. 386; Napman v. People, 19 Mich. 353.

21—Morris v. Harmer, 7 Pet. (U. S.) 554.

22—Rex v. Hunt, 31 How. St. Tr. 367.

23—Nix v. Hedden, 149 U. S. 304.

24—"Statements as to matters of general public history made in accredited historical books [by authors deceased or out of reach of process of the court] are deemed to be relevant when the occurrence of any such matter is in issue or is deemed to be relevant to the issue; but statements in such works as to private rights or customs are deemed to be irrelevant." Reynolds' Stephen on Evidence (3rd. edit.), art. 35. See also Morris v. Harmer, 7 Pet. (U. S.) 554; Roe v. Strong, 107 N. Y. 350.

reasons for excluding them are (1) They are mere hearsay evidence of matters concerning which living witnesses are available; (2) The subjects of which they treat are in an unsettled condition; (3) The language used in them is technical, and not within the comprehension of men of common experience; (4) The difficulty of determining which ones are of established authority; (5) They are without the sanction of an oath, and no opportunity is given to cross-examine their authors.[25] In England the courts refuse to allow scientific books to be read in argument before the jury.[26] In this country some courts, including those of Illinois, follow the English rule,[27] and some do not.[28] In some states books of science are admissible in evidence by statute.[29]

§ 14. **Almanacs.**—Since it is universally recognized that almanacs forecast with exact certainty planetary movements, and in consequence we govern our daily life by reference to the computations which they contain, they are held admissible in evidence to prove such computations. Thus an almanac is competent evidence to prove at what time the moon rose on a particular night;[30] or at what time the sun set on a particular day;[31] or to prove that a particular date was Sunday.[32] It is also to be observed that such matters are facts of which courts take judicial notice.

§ 15. **Mortality and tide tables.**—Standard mortality tables have frequently been held admissible to prove the probable duration of life under certain conditions, to be used as a basis in estimating the damages in personal injury cases, or the present value of an estate. And tide tables, showing the ebb and flow of the tides, have been held admissible to prove the condition of the tide at a particular time and

25—People v. Hall, 48 Mich. 482; Ashworth v. Kittridge, 12 Cush. 193.

26—Reg v. Taylor, 13 Cox C. C. 77.

27—Yoe v. People, 49 Ill. 410; Boyle v. State, 57 Wis. 472.

28—Wade v. DeWitt, 20 Tex. 398.

29—Gould v. Schermer, 101 Ia. 582.

30—Moonshower v. State, 55 Md. 11.

31—State v. Morris, 47 Conn., 179.

32—Page v. Faucet, Cro. Eliz. 227.

place.[33] Such matters are also facts of which courts take judicial notice.

§ 16. **Mode of proving public documents.**—The facts recited in a public document may be proved, of course, by introducing in evidence the document itself. It often happens, however, that such a document cannot be removed without considerable inconvenience, and danger of being lost or damaged. Moreover the same document may be wanted in more than one place at the same time. Its contents, however, may be proved either by an exemplification or a sworn copy. Acts of Congress and of the state legislatures prescribe the precise mode of proving particular kinds of public documents.[34]

33—"[Statements of relevant facts, contained in standard books of exact science or mathematics, such as the Northampton tables of mortality, almanacs or the like, may be read in evidence, but not statements in works of inductive science, such as medical books, which are not competent evidence for any purpose.]" Reynolds' Stephen on Evidence (3rd. edit.), art. 35.

34—See Rev. Stat. U. S. §§ 905-908, and the statutes of the several states.

CHAPTER XII.

ANCIENT DOCUMENTS.

§ 1. **Definition.**—The term "Ancient Document," as used in the law of evidence, means a document which is at least thirty years old.[1] Originally, the time limit was more than this. According to some decisions it was forty years,[2] and according to other decisions it was sixty years.[3]

The term is applicable to many kinds of documents, including among others, deeds, leases, wills, bonds, licenses, powers of attorney, chartularies of abbeys, stewards' books, letters, receipts, certificates, pay rolls, parish registers and entries in family bibles.

§ 2. **Mode of computing the time.**—In computing the age of a document the time is reckoned, as a general rule, from the date of its execution to the date when it is offered in evidence. It follows, therefore, that a document may be admissible in evidence as an ancient document, although less than thirty years old at the commencement of the suit.[4] In the case of

1—Whitman v. Heneberry, 73 Ill., 109. In this case Craig, J., says: "Deeds that are more than thirty years old are called ancient deeds, and they are admitted in evidence without proof of execution." See also Jackson v. Blanshan, 3 Johns (N. Y.). 298, where Kent, C. J., says: "The rule requiring thirty years as the test of an ancient deed is an old and well-settled rule of evidence."

2—Benson v. Olive, Bunb, 284 (1730). In this case a deed thirty-six years old was objected to, and the Court say: "This deed was not admitted to be read; for though sometimes thirty-five or even thirty years has been thought sufficient, yet not where it is objected to; but the usual rule is forty years." In Comyns' Digest of Evidence forty years is stated as the test; and in Isack v. Clarke, 1 Rolle, 132, this test is applied.

3—In Jackson v. Blanshan, 3 Johns. (N. Y.), 298, cited in note 1, Spencer, J., says: "The ancient rule required the lapse of sixty years before a deed proved itself; this rule has been narrowed to thirty years."

4—Reuter v. Stuckart, 181 Ill., 529; Gardner v. Granniss, 57 Ga., 555; Bass v. Sevier, 58 Tex., 557.

wills, it has been held in a few jurisdictions, including New York and Pennsylvania, that where possession under the instrument without other circumstances is relied upon, the age of the document is computed from the date of the testator's death.[5] In England, however, as well as in the great majority of the states, the computation is made from the date of the execution of the instrument, as in the case of deeds and other documents.[6]

§ 3. **The general rule.**—The general rule is that an ancient document proves itself. That is, it is admissible in evidence to prove its contents without proving its authenticity or execution by calling the attesting witnesses, if any, or by proving their handwriting, or otherwise. As stated by an eminent author, "Where any document purporting or proved to be thirty years old is produced from any custody which the judge in the particular case considers proper, it is presumed that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to be executed and attested; and the attestation and execution need not be proved, even if the attesting witness is alive and in court."[7]

§ 4. **Exceptions to the general rule.**—The general rule, stated in the next preceding section, is not applicable, (1) When fraud or invalidity is apparent on the face of the document; or, (2) When the document is not produced from the proper custody; or, according to some decisions, (3) When no corroborative evidence of the authenticity of the document is produced.

§ 5. **Suspicious circumstances, including erasures and interlineations.**—Suspicious circumstances, relating to material matters involved in an ancient document, justify the rejection

5—Staring v. Bowen, 6 Barb. (N. Y.), 109; Shaller v. Brand, 6 Binn. (Pa.), 439.

6—Doe v. Wolley, 8 B. & C., 22; Man v. Ricketts, 7 Beav., 93. In the former case, Lord Tenterden says: "The rule of computing thirty years from the date of a deed is equally applicable to a will."

7—Stephen's Digest on Evid., Art. 88.

of the instrument. Erasures or interlineations may raise a presumption of fraud sufficient to rebut the presumption of authenticity arising from the antiquity of the instrument. Starkie says, in speaking of a deed which contains an erasure or interlineation which arouses suspicion, "it is a matter of prudence and discretion to prove it in the usual way by means of an attesting witness where living, or by proof of the handwriting of an attesting witness where they are all dead, in order to rebut the unfavorable presumption arising from an inspection of the deed;" and that, if the deed "imports fraud" this ought especially to be done owing to the fact that in such case the presumption which arises from the antiquity of the deed is destroyed.[8] Taylor says, that an instrument to be admissible in evidence as an ancient document must be "free from just ground of suspicion."[9] Jones says, "If there are erasures or interlineations, or other facts giving rise to suspicion, the ancient document should be proved, like other documents, by the subscribing witnesses, or by proof of their handwriting."[10] Other writers say, that it must be "fair on its face," "free from suspicion," etc., to be admissible as an ancient document. It has been held, however, that an erasure and substitution which do not advance the interest of the obligee or increase the obligation do not affect the validity or admissibility of the instrument.[11] In the case of the mutilation of an ancient deed, if the purpose of the mutilation is not apparent, and enough is left to show that it is a deed executed in conveyance of an estate according to articles of agreement already in evidence, it should be admitted. The mutilation may affect the weight of the evidence, but not its admissibility.[12] But the fact that an instrument is an ancient document will not render it admissible if it is insufficient on its face.[13] When an ancient document is not free from suspicion its admissibility rests in the sound discretion of the court; and it has been held that if the court admits it the jury are bound to accept it as at least *prima facie* an ancient docu-

8—1 Starkie on Evid., § 344.

9—1 Taylor on Evid., § 87.

10—2 Jones on Evid., § 544.

11—Coulson v. Walton, 9 Pet. (U. S.), 62.

12—Trimlestown v. Kemmis, 9 Cl. & F., 776.

13—Fell v. Young, 63 Ill., 106; Meegan v. Boyle, 19 How. (U. S.), 149; Bogle v. Chambers, 32 Mo., 46.

ment.[14] It was formerly held that an alteration in an immaterial part of a document rendered the instrument void;[15] but this rule has been repudiated both in England and in this country because "repugnant to justice and common sense."[16]

§ 6. **Production of document from proper custody.**—An instrument to be admissible in evidence as an ancient document must be produced from the proper custody. "Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable."[17] The fact that a document has been carefully preserved by a party interested in its subject matter raises a presumption in favor of its genuineness. In submitting evidence of the custody of an instrument the object in view is to afford the court reasonable assurance of its authenticity.[18] In proving custody, however, it is not essential to show that the document has been kept in the best and most proper place. It is sufficient to show that it has been kept in a reasonable place of deposit, in view of the surrounding circumstances. As said, in a leading case, upon this point, "it is when documents are found in other than their proper place of deposit that the investigation commences, whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they were actually found; for it is obvious that while there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and probable, though differing in degree, some more so, some less; and in these cases the proposition to be determined is, whether the actual custody is so reasonably accounted for that it impresses the mind with the conviction that the instrument found in such custody must

14—1 Am. and Eng. Encyc. of Law (1st edit.), 565; Wisdom v. Reeves, 118 Ala., 418, 18 So. Rep., 13, 19.

15—Pigot's Case, 11 Coke Rep. 27.

16—Aldons v. Cornwall, L. R. 32, B. D. 573; United States v. Spalding, 2 Mason (U. S.), 478.

17—Stephen's Digest on Evid., Art. 88.

18—Whitman v. Heneberry, 73 Ill., 109; 1 Greenleaf on Evid. § 570.

be genuine."[19] The question, whether a certain place of deposit is proper custody or not, is one for the trial judge to determine; and his decision will not be interfered with unless clearly wrong.[20]

§ 7. **Corroborative evidence of the authenticity of the document.**—Whether evidence of acts of possession or enjoyment, according to the terms of the instrument, is essential or not to its admissibility as an ancient document, is not well settled. According to the earlier English decisions such evidence was not essential in the case of very ancient documents.[21] The ground of this rule was the fact that such evidence, in cases of this nature, was usually not obtainable. According to the modern English rule, corroborative evidence of possession or enjoyment is not essential to the admissibility of an ancient document, but without such evidence the instrument is entitled to little or no weight.[22] In this country the decisions are in conflict upon this question. Some courts hold that in the case of ancient deeds proof of possession under the deeds is absolutely essential to their admissibility as ancient documents,[23] while other courts, including those of Illinois and the federal courts, hold that evidence of possession is not essential, that other satisfactory corroborative evidence of authenticity is sufficient.[24]

§ 8. **Necessity of proof that the instrument is an ancient document.**—Before an instrument is admissible in evidence as an ancient document affirmative evidence is essential to prove that it is at least thirty years old. The mere fact that the instrument itself purports to be ancient is not sufficient.[25] All

19—Meath v. Winchester, 3 Bing. (N. C.), 183; Havens v. Seashore, etc., Co., 47 N. J. Eq., 365.

20—Rees v. Walters, 3 M. & W., 527.

21—Clarkson v. Woodhouse, 5 T. R., 412; Doe v. Pulman, 3 Q. B. D., 622.

22—Malcomson v. O'Dea, 10 A. L. Cas., 614; Rogers v. Allen, 1 Campb., 311.

23—Crane v. Marshall, 16 Me., 29; Homer v. Cilley, 14 N. H., 98.

24—Whitman v. Heneberry, 73 Ill., 109. But see Smith v. Rankin, 20 Ill., 14. See also, Fulkerson v. Holmes, 117 U. S., 389.

25—Whitman v. Heneberry, 73 Ill., 109.

that is required, however, is to produce sufficient evidence to establish a *prima facie* case.[26]

§ 9. **Scope of admissibility of ancient documents.**—As a general rule, ancient documents are offered in evidence to prove some claim of right asserted under them, but the scope of their admissibility is much broader than this. They are admissible in evidence in a suit between third parties who claim no interest under them, and for any proper purpose.[27]

26—Winn v. Patterson, 9 Pet. (U. S.), 663, 674.

27—Deury v. Midland Ry. Co., 127 Mass., 571, 581; Fulkerson v. Holmes, 117 U. S., 398.

CHAPTER XIII.

DECLARATIONS AGAINST INTEREST BY PERSONS SINCE DECEASED.

§ 1. **Definitions.**—A declaration has been defined as a statement made by a party to a transaction, or by a party having an interest in the existence of some fact in relation to such transaction.[1] A declaration against interest, however, is a statement which may be made by a stranger to the litigation, as well as by one who is a party to it, or identified in interest with a party to it, and which tends to lessen or destroy some pecuniary or proprietary right of the declarant, or impose upon him some pecuniary liability.[2] A declaration is against a pecuniary interest when it tends to diminish the pecuniary value of the declarant's property or impose upon him some pecuniary liability. A declaration is against a proprietary interest when it tends to cast a doubt upon the declarant's right of property.

§ 2. **The general rule.**—A declaration against the pecuniary or proprietary interest of the declarant, who has since died, is admissible in evidence, even in a suit between third persons who are not in any way identified in interest with him, and even although the declaration is not part of the *res gestae*, and is made *post litem motam*, provided no probable motive to falsify is apparent.

§ 3. **Grounds of admissibility.**—The grounds for admitting this class of hearsay evidence are, (1) The adverse interest of the declarant; (2) The necessity of the case. The former of these two grounds is the principal one. A strong presumption exists that declarations against the pecuniary or proprietary interest of the party who makes them are true.

§ 4. **Essentials of admissibility.**—The essentials of admissibility of this class of evidence are, (1) The declaration must

1—Bouvier's Law Dict.
2—Halvorsen v. Moon & Kerr Lumber Co., 87 Minn. 18; Humes v. O'Bryan, 74 Ala. 64.

have been, at the time it was made, against the pecuniary or proprietary interest of the declarant; (2) The adverse interest must appear; (3) The declarant must presumably have had knowledge of the adverse interest when he made the declaration; (4) The declarant must have been free from any probable motive to falsify the fact declared; (5) The declarant must be dead.

§ 5. **The adverse interest of the declarant.**—The adverse interest of the declarant, as already stated, must be of a pecuniary or proprietary nature. A mere apprehension of penal consequences, for example, is not sufficient.[3] It must not be based solely upon some contingency. It must exist at the time the declaration is made and not come into existence subsequently. On the other hand, if the declaration appears to be against the pecuniary or proprietary interest of the declarant when made, and subsequent occurrences render it favorable to him, they will not make it inadmissible.[4]

§ 6. **Declarations against interest which are also, in a measure, self-serving.**—It sometimes happens that declarations are both disserving and self-serving. In such cases it is not always an easy matter to determine whether the declarations are admissible or not. If the disserving interest predominates over the self-serving interest the declaration is admissible.[5] If the declaration is *prima facie* self-serving, or clearly shows a motive to falsify, it is inadmissible.[6] It does not follow, however, that, because the disserving interest does not preponderate, the declaration is necessarily inadmissible. Thus, a general account which shows a balance in the declarant's favor may be admissible to show an entry in the account against his interest.[7] On the other hand, it does not follow,

3—Mahaska County v. Ingalls, 16 Ia. 81; Sussex Peerage Case, 11 Cl. & F. 85; Bird v. Hueston, 10 Ohio St. 418.

4—Turner v. Dewan, 41 U. C. Q. B. 361.

5—Massey v. Allen, L. R. 13 Ch. Div. 558, 562; Freeman v. Brewster, 93 Ga. 648.

6—Libby v. Brown, 78 Me. 492; Beatty v. Clement, 12 La. An. 82.

7—Rowe v. Brenton, 3 Man. & R. 133, 267; Raines v. Raines, 30 Ala. 428.

that, because the declaration is *prima facie* against the declarant's interest, it is necessarily admissible. Thus, an indorsement, by the holder of a promissory note, of a payment of interest thereon, after the statute of limitations has begun to run against the note, is, in the absence of other evidence, inadmissible. When the declaration shows both a self-serving and a disserving interest, and the part which shows the former can be excluded without affecting the interpretation of the latter, this should be done. If, however, the two interests are so connected that to exclude the part which relates to the self-serving interest renders the part which relates to the disserving interest unintelligible, and the declaration taken as a whole shows no intention to falsify, the whole declaration is admissible. Thus, in a leading English case, an entry by a man-midwife charging for his services, and marked "paid," was held admissible as a whole because to exclude the self-serving part (the charge for services) would render the disserving part (the acknowledgment of payment) unintelligible; and the entry, taken as a whole, showed no intention to falsify.

§ 7. **Competency of the declarant.**—Dr. Greenleaf says, "In order to render declarations against interest admissible, it is not necessary that the declarant should have been competent, if living, to testify to the facts contained in the declaration; the evidence being admitted on the broad ground, that the declaration was against the interest of the party making it, in the nature of a confession, and on that account, so probably true as to justify its reception. For the same reason, it does not seem necessary that the fact should have been stated on the personal knowledge of the declarant."[8] This statement, it is submitted, is too broad. The decisions repeatedly assert that the declarant must be a person "having peculiar means of knowledge,"[9] "having a competent knowledge or whose duty it was to know,"[10] having "a competency to know it,"[11] etc. Some cases hold, however, that the declara-

8—1 Greenleaf on Evid., §153 (16th edit.).

9—Gleadow v. Atkins, 1 Cr. & M. 410.

10—Short v. Lee, 2 Jac. & W. 464, 489.

11—Doe v. Robson, 15 East 32.

tion may be based upon hearsay;[12] while others hold that it must be based upon personal knowledge of the declarant.[13] There are circumstances, however, where the fact, that the declarant, if living, would have been incompetent to testify, would not be a sufficient ground for excluding his declarations. Thus, at common law, a real party in interest to the suit is an incompetent witness; but this fact does not exclude his declarations against interest, after he is dead.

§ 8. **The declarant must be dead.**—With respect to some exceptions to the rule against hearsay, an equivalent disability, such as insanity, beyond the jurisdiction of the court, etc., is sufficient, upon this point, to render the declarations admissible. But in the case of declarations against interest by a person since deceased, an essential element of their admissibility is the death of the declarant.[14]

§ 9. **Admissible to prove collateral or independent facts.**—One of the peculiar features of this class of declarations is, they are admissible to prove collateral or independent facts embodied in them. Thus, in a leading English case,[15] an entry made by a man-midwife, charging for his services in a confinement case, and marked "paid," was held admissible to prove the date of the child's birth. And in another English case,[16] frequently cited, in which one of the three joint makers of a note sued the other two, one as the principal debtor and the other as a cosurety, the plaintiff having paid the whole amount of the note, an indorsement on the note acknowledging a payment, and containing the words, "The £300 having been originally advanced to Evan Humphreys" (the person sued as the principal debtor) was held admissible to prove that Evan Humphreys was the principal debtor.

12—Crease v. Barrett, 1 Cr. M. & R. 919.

13—Bird v. Hueston, 10 Ohio St. 428; Arbuckle v. Templeton, 65 Vt. 205.

14—Mahaska County v. Ingall, 16 Ia. 81, 95; Currier v. Gale, 14 Gray (Mass.) 504; Fitch v. Chapman, 10 Conn. 8.

15—Higham v. Ridgway, 10 East, 109.

16—Davies v. Humphreys, 6 Mees. & W. 153. See also Jones v. Howard, 3 Allen (Mass.) 223; Livingston v. Arnoux, 56 N. Y. 507, 519.

§ 10. **Admissible in a suit between strangers.**—Another feature of this class of declarations is, they are admissible in evidence in a suit between strangers.[17] That is, no identity of interest between the declarant and a party to the suit is essential. Their admissibility is based upon the improbability of their not being true, owing to the adverse interest of the declarant.

§ 11. **Declarations made by an agent.**—It is not essential to the admissibility of this class of evidence that the declarations were made by the party against whom they operated. It is sufficient if they were made by his agent, acting within the scope of his authority.[18] Preliminary proof of the agency relation is usually required in such cases;[19] but where the declaration was made in the course of public official employment proper authority is presumed.

§ 12. **Other declarations distinguished.**—Admissions are declarations against interest, but they are admissible only against the declarant and persons identified in interest with him. Then, again, the fact that the declarant is alive and in court does not exclude them. On the other hand, declarations against interest by persons since deceased are admissible in a suit between strangers, but the declarant must be dead. Confessions are admissions of guilt. They are against the interest of the person who makes them but not against his pecuniary or proprietary interest. Then again, they are admissible only against the person who makes them; and, like admissions, they are not inadmissible, because the person who made them is alive and in court. Declarations relating to the *res gestae*, shop book entries, and entries made in the regular course of business, must all have been made contemporaneously with the act done or recorded to be admissible; but this feature is not essential to the admissibility of declarations against interest by a person since deceased.[20] The fact

17—Higham v. Ridgway, 10 East 109.

18—Doe v. Stacey, 6 Car. & P. 139; Mayor v. Warren, 5 Q. B. D., 551.

19—Rutzen v. Farr, 4 Adol. & Ell. 53; 1 Greenleaf on Evid., §154.

20—Scott v. Ford, 140 Mass. 157; Doe v. Lurford, 3 Barn. & Ad. 890.

that they were made subsequently may affect their weight but not their admissibility. Nor will the fact that they were made *post litem motam* exclude them.[21] In this respect they differ from declarations relating to pedigree, and declarations relating to public and general rights.

§ 13. **Form of the declaration.**—The form of the declaration is immaterial. It may be oral or written. Written declarations, however, are more frequently involved than oral ones, but the principle is the same in both. Oral declarations against an interest in lands have sometimes been held admissible on the ground that they formed part of the *res gestae.*[22] The supreme court of Massachusetts formerly held this view;[23] but later modified it.[24] If the basis of admissibility is the fact that the declarations formed part of the *res gestae,* those in favor of the declarant's interest would be admissible as well as those against his interest. The true basis of admissibility, however, is the adverse interest of the declarant.

§ 14. **Inadmissible to prove contracts, or the execution or revocation of a will.**—Declarations which merely purport a contract, and resulting mutual obligations, are inadmissible. As said by Lord Coleridge, in speaking of an entry recording an informal agreement for labor, "This was not an entry against the party's interest, unless the mere making of a contract be so, and if that were the case, the existence of a contract would be against the interest of both parties to it."[25] In such cases a presumption exists that the agreement is not to the disadvantage of either party. Declarations which merely purport the execution or revocation of a will are inadmissible, because such acts and their consequences being wholly within the control of the declarant are not deemed prejudicial to him.[26]

21—Halvorsen v. Moon & Kerr Lumber Co., 87 Minn. 18.

22—1 Greenleaf on Evid., §109.

23—Marcy v. Stone, 8 Cush. (Mass.) 4.

24—Ware v. Brookhouse, 7 Gray (Mass.) 454.

25—Reg. v. Worth, 4 Q. B. D. 132, 139.

26—Hosford v. Rowe, 41 Minn. 245.

§ 15. Weight of this class of declarations.—The weight to be given this class of evidence depends upon the nature of the declaration, the circumstances under which it was made, and the reputation of the declarant for veracity. The three chief reasons for excluding hearsay are all applicable to this class of declarations, viz.: (1) The declaration was not made under oath; (2) No opportunity exists to cross-examine the declarant; (3) No opportunity exists for the jury to observe the demeanor of the declarant. As said in one case, "the ordinary and highest tests of the fidelity, accuracy, and completeness of judicial evidence are here wanting." On the other hand, the adverse interest of the declarant renders it extremely improbable that the declaration is false; and for this reason it usually possesses the same probative force, and is entitled to be given the same weight, as other evidence of a similar character. This question, of course, is wholly for the jury.

§ 16. The question of admissibility.—The function of determining whether the declaration is admissible or not, belongs, in the first instance, to the court. If the court admits it, the jury may decide that it is not actually against the interest of the declarant and for this reason give it no weight; or, the jury may wholly discard it because other evidence has nullified its effect.[27]

27—Taylor v. Witham, L. R. 3 Ch. Div. 605.

CHAPTER XIV.

ACCOUNT-BOOKS OF PARTIES TO THE LITIGATION.

§ 1. **Definitions.**—The term "account" has no very clearly defined legal meaning. Bouvier defines it as "a detailed statement of mutual demands in the nature of debt and credit between parties arising out of contracts or some fiduciary relation."[1] This definition has been approved, but it is faulty in requiring that the demands be mutual. It is not essential that each party has demands against the other. Abbott says: "An account is a written statement of pecuniary transactions."[2] Chancellor Sanford says: "An account is no more than a list or catalogue of items whether of debts or credits."[3] Chief Justice Shaw says: "The primary idea of account, *computatio*, whether we look to the proceedings of courts of law or equity, is some matter of debt and credit, between parties. It implies that one is responsible to another for moneys or other things, either on the score of contract or of some fiduciary relation of a public or private nature created by law or otherwise."[4]

§ 2. **Account-book entries versus entries made in the regular course of business.**—It is important to discriminate between these two classes of evidence. In a sense they are branches of the same exception. They are closely related in principle, and probably traceable to a common origin; but they are not identical. Their requisites are not the same, and the historical development of the one differs from that of the other. Moreover, the use of the former antedates that of the latter by nearly a century. Both, however, antedate the rule against hearsay; and are, therefore, strictly speaking, independent of that rule.

§ 3. **The early English rule.**—According to the early English rule, which had its origin in the latter part of the sixteenth

1—Bouvier's Law Dictionary.
2—Abbott's Law Dictionary.
3—Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.), 587.
4—Whitewell v. Willard, 1 Met. (Mass.), 216.

century, entries in account-books, made either by the parties themselves or their clerks, and which related to the sale of goods or the performance of services, were admissible in evidence. In 1609 a statute was passed which restricted this rule.[5] This statute excluded account-books "in any action for any money due for wares hereafter to be delivered or for work hereafter to be done," except within one year after the delivery of the wares or the doing of the work. The lower courts, however, continued to follow the early rule. The higher courts ultimately excluded the entries after the expiration of the year. In the latter part of the seventeenth century entries by a clerk, since deceased, began to be admitted on the ground that they were made in the regular course of business.[6]

§ 4. **The modern English rule.**—For two centuries, the higher courts of England excluded account-book entries after the expiration of a year. The basis of this rule was the principle that a man cannot make evidence for himself. In 1883 a rule of court re-introduced the use of account-book entries in the higher courts; and this, together with subsequent legislation, restored the custom which existed at common law.

§ 5. **The American rule.**—The historical development of the American rule has been widely different from that of the English rule. To a considerable extent, however, the English statute of 1609, or a similar one, was in force in the Colonies; but account-book entries were not repudiated as in England. Numerous restrictions existed as to their use, but none as to the time of introducing them. As a general rule, no distinction was made between entries made by the party himself and those made by his clerk.[7] This rule still obtains.[8] In most jurisdictions it was essential that the entries be verified by a "suppletory" oath. This rule is still followed. The whole subject, however, is one which is very generally regulated by statutes, and the various statutes are not harmonious. Taylor says, the doctrine, that account-book entries made by a party himself

5—7 Jac. I., ch. 12.

6—Pitman v. Maddox, 1 Lord Raymond, 732; Price v. Torrington, 2 Lord Raymond, 873.

7—Inslee v. Prall, 23 N. J. L., 457; Holmes v. Marden, 12 Pick., 169.

8—Borgess Investment Co. v. Vette, 142 Mo., 560; Post v. Kemerson, 72 Vt., 341.

are admissible in his favor, is not in accordance with the principles of the English common law.[9] Some of our courts hold the same view[10] and some hold the contrary.[11]

§ 6. **Grounds of admissibility.**—The two grounds of admissibility of account-book entries are: (1) Necessity; (2) A circumstantial guarantee of trustworthiness. The former of these grounds has been recognized very frequently. At common law, parties to the suit were incompetent witnesses. In consequence of this fact it frequently happened that the only evidence a party to the suit had was his account-book entries. To have excluded these would have resulted in great hardship to him; hence, on the ground of necessity they were held admissible.[12] Modern statutes, however, have made parties to the suit competent witnesses. As a result of these statutes the ground of necessity has passed away; but account-book entries are still held admissible. The latter of the two grounds of admissibility is based upon, (a) the influence of habit; (b) the fact that a false entry is most likely to be detected and disputed; and, in the case of entries by clerks, (c) the danger of censure and discharge by the employer for making false entries. As stated by Chief Justice Tindal, "It is easier to state what is true than what is false; the process of invention implies trouble, in such a case unnecessarily incurred."[13]

§ 7. **Requisites of admissibility.**—Account-book entries to be admissible must possess the following requisites: (1) The

9—2 Taylor's Evid. (Chamberlayne's Ed.), § 709.

10—Inslee v. Prall, 23 N. J. L., 457; Swain v. Cheney, 41 N. H., 232.

11—F. H. Hill Co. v. Somer, 55 Ill. App., 345; 1 Greenleaf Evid., §§ 117, 118.

12—"In consideration of the mode of doing business in the infancy of the country, when many people kept their own books, it has been permitted from the necessity of the case to offer these books in evidence" (1808). Tilghman, C. J., in Starrett v. Bull, 1 Binn., 237.

"It has been sanctioned as an exception to the general rule of law, as it formerly existed, that a party should not be a witness in his own cause, and from supposed necessity in order to prevent a failure of justice, that he shall be allowed to produce the record of his daily transactions, to many of which, on account of their variety and minuteness, it cannot be expected there will be witnesses" (1882). Devens, J., in Pratt v. White, 132 Mass., 477.

13—Poole v. Dicas, 1 Bing. (N. C.), 649.

entries must be original; (2) They must have been made reasonably contemporaneous with the acts done; (3) The party who made them must, as a general rule, have had personal knowledge of the facts recorded; (4) The nature of the business must be such as to make the keeping of account-books reasonably necessary; (5) The entries must be free from suspicion.

§ 8. **Entries must be original.**—Account-book entries to be admissible in evidence must be original. The rule, however, does not exclude entries subsequently made from mere memoranda. Thus, entries in a daybook or ledger, transcribed therein from memoranda temporarily made on a slate, or on sheets of paper, are original entries. The form of the book is immaterial, provided the entries are original. As said by Chief Justice Parker, in an early Massachusetts case,[14] "It is no objection to the book received in evidence in this case that it was kept in the ledger form; for such is the way in which ordinary mechanics, especially in the country, make their charges; having a separate page for each of their customers. . . . . The entries in this book may be considered original although transcribed from a slate; the slate containing merely memoranda, and not being intended to be permanent." On the other hand, entries contained in a ledger, and which were posted from a daybook or journal, are not original entries. Such entries, however, are admissible as secondary evidence, provided a proper foundation has been laid for their introduction.

§ 9. **Entries must be contemporaneous.**—The entries to be admissible must be reasonably contemporaneous with the transactions recorded. It is not essential, however, that they be made at the very hour that the transactions occur. It is sufficient if they be made within a reasonable time thereafter. What constitutes a reasonable time depends upon the circumstances of the particular case. The circumstances may be such as to render entries made several days after the transactions occurred reasonably contemporaneous and admissible. As said by Justice Bigelow, "The rule does not fix any precise time within which they must be made. There is

14—Faxon v. Hollis, 13 Mass., 427 (1816).

no inflexible rule requiring them to be made on the same day. In this particular every case must be made to depend upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries. Upon questions of this sort much must be left to the judgment and discretion of the judge who presides at the trial."[15] The basis of the rule is assurance of accuracy. It is sufficient, therefore, if the entries are made near enough to the transactions recorded to show a likelihood that they are correct. As said by Justice Sergeant, "The entry need not be made exactly at the time of the occurrence; it suffices if it be within a reasonable time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which a knowledge of it was derived unimpaired. The law fixes no precise instant when the entry should be made."[16].

§ 10. **The person who makes the entry must have personal knowledge.**—As a general rule, the person who makes the entry must have personal knowledge of the transactions recorded. This rule, however, has qualifications. Entries made by a bookkeeper, of sales made by another person who reports them to the bookkeeper, are admissible in evidence. In such a case, however, according to the prevailing rule, the person who made the sales must be called as a witness. This rule obtains in the federal courts.[17] Some courts, however, including those of Illinois,[18] hold that the entries are admissible even though the party who made the sales cannot be produced.

§ 11. **The nature of the business.**—The nature of the business must be such as to make the keeping of account-books reasonably necessary. Thus, the account-books of a peddler have been excluded because the nature of his business is not such as to necessitate the keeping of account-books.[19] And a schoolmaster's books have been excluded owing to the nature

15—Barker v. Haskell, 9 Cush., 221 (1852).

16—Jones v. Long, 3 Watts, 326.

17—Chicago Lumbering Co. v. Hewitt, 64 Fed. Rep., 314.

18—Chisholm v. Beaman Mach. Co., 160 Ill., 101.

19—Thayer v. Deen, 2 Hill (S. C.), 677; Baldridge v. Penland, 68 Tex., 441.

of his occupation. As said by Justice Colcock, "The court have always kept in view the necessity of the evidence. Now there are few persons in business who are furnished with as many witnesses as a schoolmaster may command, and there is no necessity for admitting his books to be produced in evidence."[20] On the other hand, account-books of physicians, attorneys and other classes of professional men, have been held admissible.[21]

§ 12. **The nature of the entries.**—According to the strict rule which originally obtained and which is still recognized in many jurisdictions, the entries must relate to goods sold or services performed. Under this rule entries of cash payments, or loans, are inadmissible. The reason which is usually assigned for this restriction is, that in the case of cash payments or loans no necessity exists for introducing in evidence account-book entries. As said by Justice Potts, in rejecting a series of cash entries, "We must endeavor to solve the question by a resort to first principles. . . . The consideration of necessity introduced the rule in reference to the admission of books of account. . . . I hold, first, that there is not and never was a necessity for making books of entry evidence of the payment or the lending of money. There is no such great and overruling amount of inconvenience in requiring that men should take a receipt for money, when they pay it, or a note or memorandum for money when they lend it, as that the safe, sound principle of legal evidence should be overturned on account of it. It is the ordinary mode in which all careful, prudent men transact such business."[22] On the other hand, a few courts see no reason for making such a restriction. Thus, Chief Justice Kirkpatrick says, "Upon principle I can see no reason why a book should be lawful evidence of one item and not of another; why it should be evidence of goods sold and delivered, and not of money paid or advanced. Why should there be witnesses called or receipts taken in the one case more than in the other? If necessity be pleaded for the one, may it not

20—Pelzer v. Cranston, 2 McC., 128.

21—Bay v. Cook, 22 N. J. L., 343; Codman v. Caldwell, 31 Me., 560; Bass v. Gobert, 113 Ga., 262.

22—Inslee v. Prall's Executor, 23 N. J. L., 463.

for the other also? For they are both transactions in the common course of business, equally necessary and, I should think, equally frequent or nearly so."[23] As a general rule, however, cash books, invoice books, check-stub books, loan registers of a broker, and memorandum books, are excluded.

Account-book entries of goods delivered to third persons and charged to the defendant as guarantor or principal are inadmissible. The reason for this rule is, no necessity exists for introducing the entries since the third persons can be put upon the stand to testify.

This class of testimony is also inadmissible to prove the terms of a special contract. The ground for this rule is, a writing usually exists between the parties, hence no necessity exists for introducing account-book entries.

As a general rule, account-book entries are inadmissible to prove large amounts. According to the English rule the maximum is 40 shillings. In analogy to the English rule, the maximum in this country is usually $10. In a Massachusetts case, an entry showing a charge of $300 for "seven gold American watches" was excluded because the amount involved was too large.[24]

23—Wilson v. Wilson, 1 Halst., 99. To the same effect is Ganahl v. Shore, 24 Ga., 24. In this case, Justice Lumpkin, in repudiating the restriction, says: "In the nature of things no such principle can be maintained. . . . The business of banking is confined almost entirely to money items; so of the books of factors and commission merchants; so of brokers. Large pecuniary advances are made by commission houses to planters, in anticipation of crops; the customer sends an order for a thousand dollars; it is forwarded and charged to the planter's account; true, the factor has the written order, but the cash advanced depends upon the evidence of the books. Whatever doctrine may have obtained formerly upon this subject, the world is too much in a whirl, there is too much to be done in the twenty-four hours now, to allow of the particularity and consequent delay in the obtaining of receipts, etc. . . . He that so affirms [the rejection of money items] is half a century behind the age in which he lives; and to get up with it, he must forget the things that are behind, and press forward, for it will never stop or come back to him." Also to the same effect are Taliaferro v. Ives, 51 Ill., 247 (account books held admissible to show "how he had paid the notes"); Hancock v. Kelly, 81 Ala., 368; Stephen v. Metzger, 95 Mo. App., 609; Gleason v. Kinney, 65 Vt., 560.

24—Bustin v. Rogers, 11 Cush. (Mass.), 346.

Nor are account-book entries of immoral transactions admissible. The reason for this rule is that such transactions are against public policy and should be discouraged. Thus, a gambler's "Poker Book" of accounts has been excluded;[25] and also an account-book of billiard games.[26]

§ 13. **Entries must be free from suspicion.**—The rule is well settled that entries to be admissible in evidence must bear an honest appearance. Material alterations or erasures raise a presumption against them, and render them inadmissible unless satisfactorily explained. A mere failure to state prices, however, does not have that effect. But the insertion of impossible dates, or the peculiar method by which the books are kept, may arouse suspicion and render the entries inadmissible.[27]

§ 14. **Death of entrant not essential.**—It is not essential to the admissibility of account-book entries that the party who made them be dead. He may be living and in court.[28] On the other hand, his death or insanity does not render the entries inadmissible.[29]

§ 15. **Mode of proof.**—Account-book entries to be admissible must be authenticated. The mode of doing this varies in the different states. If the party who made them is available, he should verify them.[30] This rule is applicable whether the entries were made by a party to the suit or his clerk. In some states it is essential to show that the books were honestly and fairly kept.[31] In some jurisdictions this may be done by the party who kept them,[32] while in others it must be done by

25—Frank v. Pennie, 117 Cal., 254.

26—Boyd v. Ladson, 4 McC., 76.

27—Wilson v. Wilson, 6 N. J. L., 114; Richardson v. Emery, 23 N. H., 220.

28—Bolling v. Fannin, 97 Ala., 619; Bland v. Warren, 65 N. C., 372.

29—Holbrook v. Gay, 6 Cush. (Mass.), 215; Slade v. Leonard, 75 Ind., 171; Lunsford v. Butler, 102 Ala., 403.

30—Frick v. Kabaker, 116 Ia., 494; see also note to Union Bank v. Knapp, 15 Am. Dec., 181.

31—Countryman v. Bunker, 101 Mich., 218; Smith v. Smith, 163 N. Y., 168.

32—Anchor Milling Co. v. Walsh, 108 Mo., 277; Mathes v. Robinson, 8 Metc. (Mass.), 269.

those who dealt with him.[33] Secondary evidence of account-book entries is admissible provided a proper foundation is laid for its introduction.[34] Some courts, however, have held the contrary.[35] Some courts hold that if the party kept a clerk, who is available but is not produced, the entries are inadmissible.[36] While other courts hold the contrary.[37]

§ 16. Effect of statutory enactments which make parties to the suit competent witnesses.—Statutes have been passed, both in England and in this country, making parties to the suit competent witnesses. These statutes remove the necessity which formerly existed for admitting in evidence account-book entries. So the question arises, what is the effect of these statutes upon this point? While the decisions are not wholly harmonious, they hold quite generally that the effect is not to exclude account-book entries, but to modify their use or application. Before the statutes, such entries were admissible to prove their contents. They were original or primary evidence. Since the statutes, they are admissible merely to corroborate the evidence of the party to the suit. They are secondary evidence to corroborate primary evidence.[38] Upon principle, the true

33—Cole v. Anderson, 8 N. J. L., 83; Werbeskie v. McManus, 31 Tex., 116.

34—Holmes v. Marden, 12 Pick. (Mass.), 169; Tucker v. Bradley, 33 Vt., 324.

35—Creamer v. Shannon, 17 Ga., 65; Higgs v. Shehee, 4 Fla., 382.

36—Ruggles v. Gatton, 50 Ill., 412; Smith v. Smith, 163 N. Y., 168.

37—Bartholomew v. Farwell, 41 Conn., 107; Mitchell v. Belknap, 23 Me., 475.

38—In the recent case of Bushnell v. Simpson, 119 Cal., 658 (51 Pac. R., 1080), the Court say; "At the time when parties to an action were not competent witnesses in their own behalf, their books of account were admitted in evidence upon a proper showing of the mode in which they had been kept, and were treated as original evidence of the matters for which they were introduced; but, since parties have been allowed to testify concerning all the facts for which the books were formerly offered, their testimony in reference thereto constitutes primary evidence of these facts, and the books of account become merely secondary or supplementary evidence. The books are not excluded as incompetent, but will be received, either in corroboration of the testimony of the parties as entries made at the time, or upon the principles by which inferior evidence is received where the party is unable to produce evidence of a higher degree."

In Nichols v. Haynes, 78 Pa.

view is that, since the statutes, account-book entries are admissible as records of past recollection. As such, they are not hearsay evidence at all; and, therefore, do not constitute an exception to the hearsay rule. They are adopted by the witness as his evidence and he may be cross-examined upon them as upon any other evidence.[39]

St., 174, the Court say: "Questions in relation to books of entry as evidence, since the Act of 1869 (Penn. Statutes), making the parties witnesses, stand upon a different footing from that on which they stood before. Then the book itself was the evidence, and the oath of the party was merely supplementary. Now the party himself is a competent witness, and may prove his own claim as a stranger would have done before the act of 1869. That the facts contained in the book, either of charge or discharge, of cash or goods, or whatever else is in his personal knowledge, might be proved by a stranger, no one doubts. A clerk, for instance, could prove the account, including cash items, from his own knowledge, and might use the book to refresh his memory. The party now stands by force of the act on the same plane of competency as the stranger stood upon, and therefore may make the same proof that a stranger could; he may also refer to entries made at the time of the transaction in corroboration of his testimony."

39—Wigmore on Evid., Vol. II., § 1560. In 1 Greenleaf on Evid. (16th edit.), 212, the same author says: "The basis of this branch of the exception, as has been seen, was the supposed necessity for resort to such evidence, the party being unable to take the stand in his own behalf as a witness. It would follow, on principle, that since the abolition of parties' incompetency this necessity no longer exists, because the party can now take the stand and testify, using the books, if he pleases, as a record of past recollection. At the present day, then, the true view is that the special hearsay exception in favor of parties' books has disappeared, and that the party should use them only by taking the stand and adopting them only as records of past recollection—a result preferable in practice as well as principle, because the party is thus subjected as he should be to cross-examination on the subject of the entries, and because they can thus be used without the rigorous and detailed limitations above described. This view, however, has as yet found full acceptance in a few courts only. It must be stated that in some states statutes have been passed, apparently attempting to modify the present branch of the exception by enlarging it to include parties' books kept by a clerk; but the phrasing of these statutes is usually such that their precise object and effect is not easy to ascertain."

§ 17. **Statutory enactments which make account-book entries admissible.**—In most of the states statutory enactments have been passed which regulate the admission in evidence of account-book entries. These statutes are not harmonious, but, in general, they recognize certain fundamental prinicples. As stated in a prominent New York case, "These statutes all expressly recognize the admissibility and provide for the admission of books of account on a proper showing, to be made in the manner required by the statutes themselves; but they vary somewhat in form and language, and the way in which the book's admissibility is recognized, and in which the terms of the statute are made applicable. Thus, in some states the statutes are enacted as independent statutes expressly for the purpose of allowing the use of such evidence. While others are a part of, and embraced in, the statutes prohibiting a party from testifying for himself when his adversary is the personal representative of a deceased person, or is otherwise incapacitated and form an exception to that prohibitive clause—that is to say, the party offering his books is competent to make the proof necessary to their introduction in evidence, although his adversary be incapacitated as above, and his books are then competent evidence for him. But they all attain the same result, and that is that if the party desiring to use his own books in his own behalf accompanies the offer of the books with the proof required by the statute under which the offer is made, they are competent evidence for him. Such statutes of both classes are to be found in the states from which the cases in the note are cited as applying the terms of the statutes to the books under consideration."[40]

§ 18. **Functions of court and jury.**—The question, whether certain account-book entries are admissible in evidence, is primarily for the court to determine. The weight to be given them, if admitted, is for the jury to determine. As stated by

40—Smith v. Smith, 163 N. Y., 168, and note in 52 L. R. A., 545. For an interpretation of the Ill. statute, see Weigle v. Brantigam, 74 Ill. App., 285, 290. See also, Shaffer v. McCrackin, 90 Ia., 578; Talbotton R'y Co. v. Gibson, 106 Ga., 229; note to Price v. Torrington, Smith's Lead. Cas. (Amer. edit.), 328; 9 Am. & Eng. Ency. Law (2d edit.), 913, *et seq.*

Justice Devens, "It is for the court to decide upon the admissibility of the book offered, although the weight to be given to it afterwards must be largely for the jury, in connection with its appearance the manner in which it is kept, and the other evidence in the case. It must appear to have been honestly kept, and not intentionally erased or altered, and to have been the record of the daily business of the party, made for the purpose of establishing a charge against another. Necessarily, regard is to be had to the education of the party, his methods and knowledge of business etc., in deciding this question. The decision of the court to admit the book is final and conclusive, unless from its character, or from that which was sought to be proved by it, it could not have been admitted even if it met those tests."[41] And, as stated by Justice Woodward, "When a book of original entries is offered in evidence, supported by the oath of the party, the court examines it to see if it appears, prima facie, to be what it purports to be. If there are erasures and interlinations, and false or impossible dates, touching points that are material, or if for any reason it clearly appears not to be a legal book of entries, the court may reject it as incompetent (citing cases). If this does not clearly appear, it is to be submitted to the jury to judge of, and then it is competent for the adverse party to show its general character by pointing to charges and entries affecting other parties, and by calling witnesses to prove such entries false and fraudulent. That this investigation may not run into excessive departure from the issue on trial, the court should limit it to the time, or near the time, covered by the account in suit, and should suffer no more examination of collateral cases than would bear directly on the general character of the book. If a shop-book exhibit, in respect to customers generally, illegal dates, as on Sunday, or impossible dates, as 31st of June or 30th of February, or altered dates, or earlier dates after those that are later, or any such condemning features, they are evidence for the jury upon the general character of the book. The jury may form some opinion from such examination, how far it is entitled to weight in the scales which they

41—Pratt v. White, 132 Mass., 477.

are holding. Whilst they should make all due allowances for mistakes, for ignorance and unskilfulness in book-keeping, and for peculiarities in the plaintiff's business they should insist on the general honesty and accuracy of the book, made in secret by one party against the other, and now offered as a guide to the conscience of the jury."[42]

42—Funk v. Ely, 45, Pa. St., 444.

CHAPTER XV.

DECLARATIONS OF THIRD PERSONS MADE IN THE REGULAR COURSE OF DUTY OR BUSINESS.

§ 1. **The general rule.**—Declarations and entries made in the regular course of duty or business, at or about the time the fact or facts stated occurred, by third persons who are unavailable as witnesses, are admissible in evidence.

§ 2. **Origin and scope of the rule.**—This rule had its origin near the beginning of the eighteenth century. The case usually cited as the landmark is Price v. Lord Torrington,[1] decided in 1703. The rule admitting account-book entries had its origin about a century earlier.

Entries made in the regular course of business have a much wider scope than account-book entries. The former include the latter, but the requisites of admissibility of each are not identical.

§ 3. **Other declarations distinguished.**—Care should be taken to avoid confusing this class of declarations and account-book entries, declarations relating to the *res gestae* and declarations against interest. Account-book entries, to be admissible as such, must be contained in the books of a party to the suit; while entries made in the regular course of business may be in the books of a stranger to the suit. Again, the former entries must be contained in account-books; while the latter may be contained in any book. Then again, in the case of the former entries the entrant may be living and in court; while in the case of the latter the entrant must be unavailable as a witness. Declarations relating to the *res gestae* must be contemporaneous with the acts done, and be so intimately interwoven with them as to be regarded as parts of them; while declarations made in the regular course of business may be made within a reasonable time after the

1—2 Lord Raymond, 873.

transactions occur. Declarations against interest are, of course, adverse to the declarant; while declarations made in the regular course of business may be in his favor.

§ 4. **Grounds of admissibility.**—The grounds of admissibility of this class of declarations are the same as those for admitting account-book entries, viz.: (1) Necessity; (2) Trustworthiness. As regards the former of these two grounds, it is not essential that the declarations comprise the only evidence available on the subject, but it is essential that they comprise the only evidence available from the declarant. Hence it follows that the declarant must be unavailable as a witness. In speaking of this class of evidence, Justice Story says: "It is the best evidence the nature of the case admits of. If the party is dead, we cannot have his personal examination upon oath, and the question then arises, whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove facts where ordinary prudence cannot guard us against the effects of human mortality."[2] The circumstantial guarantee of trustworthiness of such evidence is founded upon the following facts: (a) The habit of making entries regularly, calls for accuracy; (b) False entries are likely to be detected and disputed; (c) Such entries usually bring trouble and disgrace to the person who makes them.

§ 5. **Requisites of admissibility.**—The requisites of admissibility of this class of evidence are the following: (1) The declarations or entries must have been made in the discharge of some duty, or in the usual course of business; (2) They must have been made at the time when the transactions to which they relate occurred, or within a reasonable time thereafter; (3) The declarant must, as a general rule, have had personal knowledge of their contents; (4) The declarant must be dead, or for some other reason unavailable as a witness.

§ 6. **The entries must be made in the discharge of a duty, or in the usual course of business.**—According to the English rule, this class of declarations to be admissible must be made

2—Nicholls v. Webb, 8 Wheat. (U. S.), 326.

3—Poole v. Dicas, 1 Bing. (N. C.), 649.

in the discharge of some official, professional or other duty, to a third party. Thus, in one case,[4] in which the return of an officer, since deceased, contained the date and place of arrest, the court rejected the entry as to the *place* of the arrest, saying: "It may be the duty of the sheriff's officer to make a return to the sheriff that he has made the arrest; but it is not a necessary part of that duty that he should state the particular place of the arrest." In this country, however, a more liberal rule obtains. An absolute duty to make the entries is not essential. As stated by Justice Andrews (citing 1 Greenl. on Evid. § 115): "It is sufficient if the entry was the natural concomitant of the transaction to which it relates and usually accompanies it."[5]

§ 7. **The entries must be contemporaneous with the transactions to which they relate, or made within a reasonable time thereafter.**—It is usually stated that this class of entries to be admissible must be contemporaneous with the transactions to which they relate. Upon this point, however, the same degree of strictness is not required as in the case of declarations relating to the *res gestae*. There is no definite and fixed rule as regards the time which may elapse between the transactions and the entries. Each case is governed by its own circumstances. It may be customary to jot down memoranda of the transactions when they occur and subsequently make entries of them in the regular course of business. It has been held, however, that such memoranda must be made in the usual routine of business, and not as a merely private affair.[6]

§ 8. **As a general rule, the entrant must have personal knowledge of the transactions.**—This requirement is applicable both to account-book entries and entries made in the regular course of business. The rule, however, has important qualifications; but, upon this point the decisions are not harmonious. Upon principle, absolute personal knowledge of the entrant is not essential. If the want of such knowledge

4—Chambers v. Bernasconi, 1 C. & J., 451.

5—Fisher v. Mayor, 67 N. Y., 73, 77.

6—Peck v. Valentine, 94 N. Y., 569; Mayor v. Second Ave. Ry. Co., 102 N. Y., 572.

be adequately supplied by a third party it should suffice. Thus, suppose a clerk reports sales to the bookkeeper who makes entries of them. The fact that the bookkeeper has no personal knowledge of the sales should not render the entries inadmissible. Verification of the sales by the clerk, and of the entries by the bookkeeper (in the case of account-book entries), should render the entries admissible. And since the entries are made in the regular course of business, the death of either, or both, of these parties, should not render the entries inadmissible. As stated by Professor Wigmore, in his recent exhaustive treatise on Evidence, *"where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present Exception, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so."* But, as heretofore stated, the decisions upon this point are not harmonious. Some follow the conclusion reached by Professor Wigmore, and admit such entries without requiring that the original party having personal knowledge of the transactions be produced or accounted for. This rule obtains in Illinois.[7] Some hold that the entries are admissible provided the original party is dead, or otherwise unavailable as a witness, and the entries are verified.[8] While a few courts refuse to admit such entries when the original party is not produced although he is shown to be unavailable.[9]

§ 9. **The entrant must be dead, or, at least, unavailable as a witness.**—According to the English rule the entrant must be dead. In this country, however, the rule is more liberal. Insanity, or even absence from the state, is held to be sufficient. As stated by Chief Justice Shaw: "The ground is the impossibility of obtaining the testimony, and the cause of

7—Chisholm v. Machine Co., 160 Ill., 101; Donovan v. Ry. Co., 158 Mass., 450.

8—Meyer v. Brown, 130 Mich., 449; Stanley v. Wilkerson, 63 Ark., 556.

9—Kent v. Garvin, 1 Gray (Mass.), 150; Chicago Lumberine Co. v. Hewitt, 64 Fed. Rep., 314.

such impossibility seems immaterial."[10] Physical incapacity has been held insufficient;[11] but, upon principle, it should suffice.

§ 10. **Partnership entries.**—Since partnership books are usually kept in the regular course of business they are admissible as such, as a general rule, for and against each partner as between themselves;[12] and in favor of third persons against the firm.[13] This rule is applicable to special or dormant partners, as well as ostensible partners, provided they have access to the books.[14] It is not applicable if they do not. As a general rule, entries in partnership books are inadmissible to prove or disprove the partnership relation.[15] Whether the partnership books are kept by the partners themselves, or by their bookkeeper, is immaterial.[16]

§ 11. **Application of entries made in the regular course of business.**—Such entries are admissible not only to prove their contents, but also to corroborate or impeach other evidence.[17] And, when acquiesced in by another party, they are binding against him in a suit between him and a third party. In such a case they are treated as admissions or estoppels.[18] In England, oral declarations made in the regular course of business are held admissible;[19] but in this country they are not.[20]

10—North Bank v. Abbot, 13 Pick., 471.

11—Taylor v. Ry. Co., 80 Ia., 435.

12—Glover v. Hembree, 82 Ala., 324; Topliff v. Jackson, 12 Gray (Mass.), 565.

13—Grant v. Masterton, 55 Mich., 161; Daniels v. Fowler, 123 N. C., 35; Calder v. Creditors, 47 La. Awn., 346.

14—Bank of B. N. A. v. Delafield, 152 N. Y., 624; Robins v. Wards, 111 Mass., 244.

15—Abbott v. Pearson, 130 Mass., 191; Rosenbaum v. Howard, 69 Minn., 1. See valuable note on this subject in 52 L. R. A., 834, *et seq.*

16—New Haven, etc. Co. v. Goodwin, 42 Conn., 230.

17—Monroe v. Snow, 131 Ill., 126; People v. Kemp, 76 Mich., 410.

18—Lowenthal v. McCormick, 101 Ill., 143; Chateaugay, etc., Co. v. Blake, 144 U. S., 476. But see City of Chicago v. McKechney, 205 Ill., 372.

19—Regina v. Buckley, 13 Cox C. C., 293; Sussex Peerage Case, 11 Cl. & F., 85, 113.

20—Framingham Mfg. Co. v. Barnard, 2 Pick. (Mass.), 532.

§ 12. **Mode of proof.**—The mode of proof of this class of evidence differs in the various jurisdictions. This is largely owing to the fact that in some jurisdictions the rule governing the admissibility of such evidence is stricter than in other jurisdictions. If, as in England, the death of the declarant is essential to the admissibility of the declaration, the handwriting of the declarant must be shown.[21] If the death of the declarant is not essential, he must be called as a witness, or his deposition taken, according to some decisions.[22] In other jurisdictions the rule is more liberal. If called as a witness, or his deposition taken, the evidence should state that the entries were made in the regular course of business, at the time they purport to have been made, and that they are correct.[23]

21—Chaffee & Co. v. U. S., 18 Wall. (U. S.), 516. See also Wall. (U. S.), 516; Heiskell v. note to 15 Am. Dec., 193.
Rollins, 82 Md., 14.

22—Pratt v. White, 132 Mass., 477; Chaffee & Co. v. U. S., 18

23—Shove v. Wiley, 18 Pick. (Mass.), 558; Moots v. State, 21 Ohio St., 653.

CHAPTER XVI.

DECLARATIONS BEARING UPON THE PHYSICAL OR MENTAL CONDITION OF THE DECLARANT, OR UPON HIS INTENTION.

§ 1. **The general rule.**—When a person's physical or mental condition, or intention, is relevant and material to the fact or facts in issue, declarations by him alleging the existence of such condition or intention, and made contemporaneously with it, are admissible in evidence.

§ 2. **Grounds of admissibility.**—The two grounds of admissibility of this class of hearsay evidence are the following, viz.: (1) Necessity; (2) Trustworthiness. The necessity principle, however, is not based upon inability to produce the declarant as a witness, owing to his death, insanity, absence, or the like. Nor is it based upon mere inconvenience. But, as stated by Professor Wigmore, "It rests on the consideration that, though the person's testimony on the stand may still be both actually and conveniently practicable, yet the probability of there receiving from him testimony which shall be in value equal or superior to certain hearsay statements is small; thus, while there is hardly a necessity in the strict sense, there is at least a desirability of resorting also to the hearsay statements."[1] Justice Holmes says, "Such declarations, made with no apparent motive for misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same persons."[2] Chief Justice Redfield says, "The present state of health or feeling is always allowed to be proved in this way, since it is the only mode in which it can be shown."[3] Justice Gray says, "A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written."[4] Justice Swayne says, "Wherever the bodily or

1—Wigmore on Evid., Vol. III., §1714.

2—Elmer v. Fessenden, 151 Mass. 359.

3—State v. Howard, 32 Vt. 380, 404.

4—Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285.

mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. These expressions are the natural reflexes of what it might be impossible to show by other testimony."[5] Lord Justice Mellish says, "Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions are."[6] Chief Justice Ruffin says, "The ground of receiving those declarations is that they are reasonable and natural evidence of the true situation and feelings of the person for the time being."[7] Justice Campbell says, they "are admitted from necessity. . . . It would be impossible in most cases to know of the existence or extent or character of pain without them."[8] Justice Denis says, "It is one of the natural concomitants of illness and of physical injuries for the sick or injured person to complain of pain and distress. . . . I think such evidence is admissible from the necessity of the case."[9] Upon the whole, therefore, it may be said that a fair necessity exists for admitting in evidence such declarations made out of court and under proper circumstantial guarantees of trustworthiness.

§ 3. **Requisites of admissibility.**—The requisites of admissibility of declarations bearing upon pain or suffering are the following, viz.: (1) The declarations must relate to internal conditions and not to external circumstances which produced them; (2) They must be the natural and spontaneous expressions of the pain or suffering; (3) They must be contemporaneous with the pain or suffering.

§ 4. **The declarations must relate to internal conditions.**—The declarations to be admissible under this exception must relate to the pain or suffering itself, and not to the circumstances which produced it. Thus, a declaration by a person

5—Ins. Co. v. Mosley, 8 Wall (U. S.) 397.

6—Snyden v. Lord St. Leonards, L. R. 1 P. D. 154.

7—Lush v. McDaniel, 13 Ired. 487.

8—Grand Rapids & I. Ry. Co. v. Huntley, 38 Mich. 543.

9—Caldwell v. Murphy, 11 N. Y. 419.

that he has a severe pain in his head caused by falling down stairs is inadmissible as to the cause of the pain. As stated by Justice Lawrence, "to permit a party to prove what he himself stated to his physician, not in regard to the character and manifestations of his malady, but in reference to its specific cause, when that is one of the issues before the jury, would be carrying an acknowledged departure from the ordinary rules of evidence, having its origin in necessity, to a most dangerous extent."[10]

§ 5. **They must be the spontaneous and natural expressions of the pain or suffering.**—The declarations must be made under such circumstances as will render them free from suspicion of deception and fraud. The mere fact that they are made *post litem motam* does not render them inadmissible, but if made for the purpose of furnishing evidence they should be excluded. As stated by Justice Campbell, "We cannot think it safe to receive such statements, which are made for the very purpose of getting up testimony, and not under ordinary circumstances. . . . (They) were therefore made under a strong temptation to feign suffering if dishonest, and a hardly less strong tendency if honest to imagine or exaggerate it. The purpose of the examination removed the ordinary safeguards which furnish the only reason for receiving declarations which bear in a party's own favor. . . . It is not necessary to consider whether there may not be properly received in some cases the natural and usual expressions of pain made under circumstances free from suspicion, even *post litem motam*. The case must at least be a very plain one which will permit this."[11] And, as stated by Justice Lawrence, "he (the witness) may state what his patient said, in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation."[12]

§ 6. **They must be contemporaneous with the pain or suffering.**—As a general rule, this class of declarations to be

10—Ill. Cent. Ry. Co. v. Sutton, 42 Ill. 438, 440; State of Vermont v. Davidson, 30 Vt. 377.

11—Grand Rapids & I. Ry. Co. v. Huntley, 38 Mich. 543.

12—Ill. Cent. Ry. Co. v. Sutton, 42 Ill. 438, 440.

admissible must be contemporaneous with the pain or suffering. This requirement is not based upon the principle of necessity, but upon the principle of trustworthiness. As stated by Chief Justice Ruffin, "The ground of receiving those declarations is that they are reasonable and natural evidence of the true situation and feelings of the person for the time being. But in reference to past periods they have no such claim to confidence, as they are manifestly, to that purpose, but the narrative of one not on oath."[13] In a few jurisdictions, however, including Massachusetts, declarations relating to past pain or suffering, when made to a physician, are held admissible. As stated by Justice Endicott, "While a witness not an expert can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to a statement or narrative given by his patient in relation to his condition, symptoms, sensations, and feelings, both past and present."[14]

§ 7. **To whom the declarations may be made.**—According to the general rule, both in England and in this country, declarations relating to an existing pain or suffering may be made to anyone and be admissible. In New York, however, and in a few other jurisdictions, the courts hold that declarations to be admissible must be made to a physician. This rule, it is submitted, is wholly inconsistent both upon principle and authority. It has no application, however, to involuntary exclamations. Spontaneous manifestations of distress are to be carefully distinguished from mere descriptive statements of pain or suffering. The former are always admissible. In Illinois, the latter are admissible only when made at the time of the injury, so as to be part of the *res gestae*, or to a physician during treatment.[15] Declarations made by one physician to another physician, concerning the pain and suffering of another party, or the state of his injuries, are inadmissible unless made in the presence of the injured party.[16] And state-

13—Lush v. McDaniel, 13 Ired. 487.

14—Roosa v. Loan Co., 132 Mass. 439.

15—Lake St. Elev. Ry. Co. v. Shaw, 203 Ill. 39; West Chicago St. Ry. Co. v. Kennelly, 170 Ill. 508.

16—Village of Ponca v. Crawford, 18 Neb. 551.

ments, made by a physician to the injured party concerning his injuries, cannot be testified to by the latter party.[17]

§ 8. **Effect of statutes which permit parties to the suit to testify.**—A few courts hold that the effect of statutes which permit parties to the suit to testify is to render declarations descriptive of pain or suffering inadmissible; at least when not made to an attending physician.[18] But according to the better view they do not.[19] Upon this point, Justice Elliott, in commenting upon the leading New York case which holds the contrary, and which is cited in foot-note 18, says, "It is conceded by the court that the rule was that such declarations were competent until the enactment of the statute permitting parties to be witnesses, but it is asserted that the rule was abrogated by that statute. It seems to us that if the law once was that such declarations were admissible, it was not in the power of the court to annul it. That could only be done by legislation. Where a statute is enacted changing the common law rule, it is to be strictly interpreted and is not to be extended by construction. It is an ancient and well known rule that statutes in derogation of the common law must be strictly construed. It would be a plain violation of this rule to hold that a statute changing the one rule of law changed another and independent one. The change in the rule does not dissipate the reason, for latent injuries can only be fully known by declarations made at the time the injured person is suffering. But, however this may be, the rule is an established one, and as courts cannot legislate, they have no right to abrogate it. Judicial legislation is an evil to be avoided. The change in the law worked by the statute does not deprive a party of any competent evidence. The statute adds to his rights; it subtracts nothing from them. Although the statute makes a party a competent witness, it does not abridge his rights by taking from him evidence competent under the rule of the common law. We cannot agree, we say, in leaving this

17—Armstrong v. Town of Ackley, 71 Ia. 76.

18—Roche v. Brooklyn City & Ry. Co., 105 N. Y. 294.

19—Northern Pac. Ry. Co. v. Uelin, 158 U. S. 271; Keyes v. City of Cedar Falls, 107 Ia. 520; Bagley v. Mason, 69 Vt. 175.

point, that a party is to be deprived of legitimate evidence because the statute permits him to testify.'' [20]

§ 9. **Declarations bearing upon the mental condition of the declarant.**—Declarations bearing upon the present existing mental condition of the declarant, if naturally made and free from suspicion, are admissible in evidence. Such mental condition may comprise motive, design, intent, feeling, etc. A motive for doing a certain act, or a plan or intent to do it, is relevant to prove that it was probably done in pursuance of such motive, plan or intent; and such motive, plan or intent may be shown by contemporaneous declarations which manifest such a state of mind, if free from suspicion. As stated by Chief Justice Field, ''The fundamental proposition is that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech; and that proof of either or all of these for the sole purpose of showing state of mind or intention of the person is proof of a fact from which the state of mind or intention may be inferred.'' [22]

§ 10. **Misapplication of the res gestae principle.**—It is well to observe that some courts, in determining the admissibility of this class of declarations, erroneously invoke the *res gestae* doctrine.[23] They hold that an essential of admissibility is that the declarations accompany and characterize some act or conduct which is relevant in the litigation. This view is unsound. Whether the declarations do or do not accompany and characterize some act or conduct which is relevant in the litigation is wholly immaterial. It is sufficient to render them admissible if they characterize an existing mental condition

20—Board of Com., etc., v. Leggett, 115 Ind. 544, 547.

21—Riggs v. Powell, 142 Ill. 453; Siebert v. People, 143 Ill. 571, 585; Chicago, etc., Ry. Co. v. Chancellor, 165 Ill. 438; Inness v. Boston, etc., Ry. Co., 168 Mass. 433.

22—Com. v. Trefethen, 157 Mass. 185.

23—Lake Shore Ry. Co. v. Herrick, 49 Ohio St. 25; Siebert v. People, 143 Ill. 585; Com. v. Felch, 132 Mass. 22 (overruled in Com. v. Trefethen, 157 Mass. 185); State v. Wood, 53 N. H. 484, 494; McBride v. Com., 95 Va. 818; R. v. Wainwright, 13 Cox C. C. 171; Chicago, etc., Ry. Co. v. Chancellor, 165 Ill. 438.

which is relevant in the litigation. In commenting upon this point Professor Wigmore very wisely says, "It would be well if the invocation of the *res gestae* doctrine in this connection could be wholly abandoned."[24] In a murder case, in which evidence of the murdered person's declarations as to having an engagement to meet the defendant was admitted as a "verbal act," Chief Justice Start says, "It was not admissible, in my opinion, on the ground that it tended to 'characterize her subsequent acts and her departure on the fatal ride soon after she made the statement,'—that is, that it was a part of the *res gestae*,—for the reason that her statement neither accompanied nor characterized any act relevant to the issue. But it was relevant to the issue to show that she did meet the defendant, and evidence of her declarations of an intention and purpose to meet him was admissible as original evidence to prove that she did in fact intend to meet him. To sustain it on the ground that the statement of the deceased was a part of the *res gestae* is, in my judgment, to assign a wrong reason for a correct conclusion, which may lead to complications in future cases."[25] This view is sound.

§ 11. **Declarations of affection, emotion, malice, prejudice, etc.**—Mental conditions of affection, emotion, malice, prejudice, etc., are usually manifested by conduct. This fact, however, does not exclude direct statements concerning them. To be admissible, however, such statements must relate to an existing condition of the mind. That is, they must be contemporaneous with the condition. In actions for criminal conversation, alienation of affections, divorce, wife-murder, etc., declarations are admissible to show the declarant's state of affections. They must be made, however, under such circumstances that no motive to deceive is apparent. Thus, letters by a wife to her husband before the time of her alleged elopement and adultery, are admissible to show the state of her affections for him at that time.[26] And declarations by a wife before she left home, alleging bad treatment of her by her husband, are admissible to show that she was not enticed

24—Wigmore on Evid., Vol. III., §1726.

25—State v. Hayward, 62 Minn. 474.

26—Wright v. Tatham, 5 Cl. & F. 683.

away.[27] When a person is accused of doing a malicious act, his malice may be shown by prior declarations.[28] And, upon principle, prior statements by him showing the opposite of malice should be held admissible in his favor. Some courts, however, exclude them on the ground that to admit them would be "to allow a party to make evidence for himself."[29]

§ 12. **Testamentary declarations.**—Stephens says, "The declarations of a deceased testator as to his testamentary intentions, and as to the contents of his will, are deemed to be relevant when his will has been lost, and when there is a question as to what were its contents; and when the question is whether an existing will is genuine, or was improperly obtained; and when the question is whether any, and which of more existing documents than one constitutes his will. In all these cases it is immaterial whether the declarations were made before or after the making or loss of the will."[30]

§ 13. **Ante-testamentary declarations.**— Ante-testamentary declarations of intention to make, or not to make, a will of a certain tenor, are always admissible to show that the act specified was or was not subsequently performed. This is merely the application of the general principle, heretofore discussed, to a specific case. The declarant's intention, either to make or not to make a will of a certain tenor, is relevant to the litigation; and contemporaneous declarations which manifest this intention are admissible to show it. As stated by Lord Justice Mellish, "The declarations of the testator as to what he intended to put in his will, made either contemporaneously with or prior to the execution of his will, are obviously evidence which may corroborate the other testimony as to what is contained in the will, . . . because it is more probable that the testator has than that he has not made a particular devise or a particular bequest when he has told a person previously that he intended to make it, inasmuch as it shows that he had

27—Gilchrist v. Bale, 8 Watts 356.

28—Ransome v. McCurley, 140 Ill. 626, 31 N. E. 119; Com. v. Holmes, 157 Mass. 233, 32 N. E. 6.

29—Newcomb v. State, 37 Miss. 383, 398. In this case the accused was on trial for murder; and a statement by him, shortly before the homicide, that he "would not hurt a hair of his (deceased's) head," was excluded.

30—Stephen's Digest of Evid., Art. 29.

it in his mind to make such a will at the time he made the declaration."[31]

§ 14. **Post-testamentary declarations.** — Post-testamentary declarations as to the execution, revocation, or contents of a will are assertions of external facts, and, as such, inadmissible. As stated by Lord Justice Mellish, "A declaration after he (the testator) has made his will, of what the contents of the will are, is not a statement of anything which is passing in his mind at the time; it is simply a statement of a fact within his knowledge, and therefore you cannot admit it unless you can bring it within some of the exceptions to the general rule that hearsay evidence is not admissible to prove a fact which is stated in the declaration. It does not come within any of the rules which have been hitherto established, and I doubt whether it is advisable to establish new exceptions."[32] Lord Chief Campbell says, "Declarations of the testator after the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested as the law requires."[33] And Justice Wilde says, "But where those declarations are vouched to prove . . . the fact that he had declared and embodied those intentions in a certain will, they have no other title to confidence than the statements of any other person who had seen the will and could speak to its contents. In this aspect they become mere hearsay."[34]

31—Sugden v. St. Leonards, L. R. 1 P. D. 154, 249; Wilton v. Humphreys, 176 Mass. 253; Gordon v. Burris, 141 Mo. 602; Hope's Appeal, 48 Mich. 520; Gardner v. Gardner, 177 Pa. St. 218. *Contra*: Throckmorton v. Holt, 180 U. S. 552. In this case Justices Harlan, White and McKenna dissent. The majority opinion excludes ante-testamentary declarations of intention and states that "there is no good ground for the distinction" between ante-testamentary declarations and post-testamentary ones. In support of this view it cites only Stevens v. Vancleve, 4 Wash. C. C. 262, and makes the surprising statement that it accords with the weight of authority. It is submitted, however, that the opinion is unsound on both points.

32—Sugden v. St. Leonards, L. R. 1 P. & D. 154 (a minority opinion on this point).

33—Doe v. Palmer, 16 Q. B. D. 747.

34—Quick v. Quick, 3 Sw. & Tr. 442 (rejecting post-testamentary declarations of the testator when offered to prove the contents of his will).

§ 15. **Other theories relating to post-testamentary declarations.**—There are two theories under which post-testamentary declarations have been held admissible. One of these embodies a double process of inferences. First an inference as to the declarant's belief or consciousness that he did or did not do the act is drawn from his declarations. Secondly an inference as to his having done or not having done the act is drawn from his belief or consciousness that he did or did not do it. The former inference is an application of the general principle that direct assertions are admissible, when free from suspicion, to show an existing condition of the declarant's mind. Their weight will depend upon the circumstances of the case. The latter inference is a strong presumption of fact. For, assuming that the declarant is sane, and that he entertains the belief that he did or did not do a specific act, there is a strong probability that what he believes is true.

The other theory invokes a special exception to the hearsay rule. Under this theory the declarations are held admissible owing to a strong trustworthiness growing out of the peculiar circumstances of this class of cases. As said by Chief Justice Cockburn, "If the exception to the general rule of law which excludes hearsay evidence is admitted, on account of the exceptional position of a testator, for one purpose, why should it not be for another, where there is an equal degree of knowledge, and an equal absence of motive to speak untruly?"[35] And, as said by Jessel, M. R., in the same case, "The court should be anxious, not narrowly to restrict the rules of evidence, which were made for the purpose of furthering truth and justice, but guided by those great principles which have guided other tribunals in other countries in admitting this kind of evidence generally, to admit it at all events in the special case which we have under consideration."

§ 16. **Purposes for which testamentary declarations are held admissible.**—The chief purposes for which testamentary declarations are held admissible are the following, viz.: To show, (1) Mental capacity or incapacity of the testator; (2) Undue influence; (3) Fraud; (4) Duress; (5) The contents of a lost will; (6) Intention to make a will of a certain tenor;

35—Snyden v. St. Leonards, L. R. 1 P. & D. 154.

(7) That the declarant has or has not made a will of a certain tenor; (8) That the declarant has not made a will, or that a particular will is or is not in existence, or is or is not genuine; (9) That a particular will has or has not been revoked.

§ 17. **The decisions not harmonious.**—As regards the admissibility of certain classes of testamentary declarations, the courts agree; while as regards the admissibility of certain other classes they do not. All courts agree that both ante-testamentary and post-testamentary declarations of the testator are admissible when the issue is his mental capacity to make a will, provided they are not too remote. Most courts hold the same view when the issue is undue influence; and some when the issue is fraud or duress; but in the latter cases most courts exclude them. When the issue is the contents of a lost will, ante-testamentary declarations are quite generally held admissible; but post-testamentary declarations are held inadmissible by many courts. On the other hand, many courts, under the former of the two theories discussed in § 15, hold the latter declarations admissible, but usually restrict them to the purpose of corroborating other evidence. This rule obtains in England,[36] and also in Illinois.[37] A few courts hold such declarations admissible under the theory of a special exception to the hearsay rule, discussed in § 15. Declarations of intention to make or not to make a will are generally held admissible. Declarations that the declarant has or has not made a will, or that a particular will is or is not in existence, or is not genuine, or that a particular will has or has not been revoked, are admitted by some courts and excluded by others. The remarks previously made in regard to the admissibility of post-testamentary declarations as to the contents of a lost will are also applicable to these declarations.

36—Sugden v. St. Leonards, L. R. 1 P. & D. 154.

37—*In re* Page, 118 Ill. 576.

CHAPTER XVII.

DECLARATIONS RELATING TO THE RES GESTAE.

§ 1. **Definitions — Res gestae — Transaction.**—The literal meaning of the term "res gestae" is things done. In the law of evidence it means acts and declarations which are connected with, or form part of the transaction in controversy, and which characterize and explain it.

The term "transaction," as defined by Stephen, means "a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject of inquiry which may be in issue."[1]

§ 2. **Origin of the term "res gestae."**—Originally, the term was used in the singular form, "res gesta." It was first used in Horne Tooke's trial for high treason, in 1794.[2] It made its second appearance seven years later in a seduction case decided by Lord Kenyon.[3] In 1805 the plural form, "*res gestae,*" was freely used by counsel in the leading case of Aveson v. Kinnaird.[4] In 1808 it made its first appearance in the decisions of this country.[5] Two years later it made its appearance in the earliest American treatise on the law of evidence.[6] In 1814 Phillipps' excellent treatise on evidence was published, and in it the author says, "Hearsay is often admitted in evidence as part of the *res gestae.*"[7] In the fourth edition, however, published in 1819, the term "*res gesta*" is omitted, and the term "transaction" is substituted. This substitution also appears in the next three editions, but in the eighth edition the former term is again used. In the works on evidence by Starkie,

1—Stephen's Digest of Evid., Art. 3.

2—25 Howell's State Trials, 440.

3—Hoare v. Allen, 3 Esp., 276.

4—6 East, 188.

5—Bartlett v. Delprat, 4 Mass., 702.

6—Swift's "Digest of the Law of Evidence in Civil and Criminal Cases."

7—Phillipps on Evid., Vol. I. p. 202.

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Greenleaf, Taylor and Wharton the term, in the plural form, is freely used.

§ 3. **Scope of the term "res gestae."**—The scope of the term "res gestae" is exceedingly vague and indefinite. Chief Justice Beasley says, "I think I may safely say that there are few problems in the law of evidence more unsolved than what things are embraced in those occurrences that are designated in the law as the *res gestae.*"[8] Chief Justice Bleckley says, "The difficulty of formulating a description of the *res gestae* which will serve for all cases seems insurmountable. To make the attempt is something like trying to execute a portrait which shall enable the possessor to recognize every member of a numerous family."[9] Professor Wigmore says, "There has been such a confounding of ideas, and such a profuse and indiscriminate use of the shibboleth *res gestae,* that it is perhaps impossible to disintangle the real basis of principle involved."[10] Professor Thayer says, "We have seen that the singular form of phrase soon began to give place to the plural; this made it considerably more convenient; whatever multiplied its ambiguity, multiplied its capacity; it was a larger 'catch-all.' To be sure, this was a dangerous way of finding relief, and judges, text-writers, and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression."[11]

§ 4. **The verbal act doctrine and its misapplication.**—Much confusion exists in the decisions owing to the fact that the verbal act doctrine has been frequently misapplied. Many decisions are confusing because they fail to discriminate between this doctrine and the doctrine of spontaneous declaration. Verbal acts are not hearsay at all; and therefore, as to them, the rule against hearsay has no application. They are admissible in evidence, but not because they fall within any exception to the hearsay rule. They are original evidence, and constitute either, (1) A part of the issue; (2) A verbal part of an

8—Hunter v. State, 40 N. J. L., 536.

9—Cox v. State, 64 Ga., 374, 410.

10—Wigmore on Evid., Vol. III., § 1745.

11—American Law Review, XV. 5, 81.

act material to the issue; or, (3) Circumstantial evidence of an existing condition. They form part of the *res gestae,* and are *precisely* contemporaneous with the principal fact or condition. The rule against hearsay is applicable only to testimonial assertions; i. e., assertions offered for the special purpose of evidencing the truth of the matter asserted therein. *This principle is fundamental.* Verbal acts are not offered in evidence for this special purpose, and therefore are not testimonial assertions. As stated by Justice Eastman, "It does not follow that, because the words in question are those of a third person, they are necessarily hearsay. On the contrary, it happens in many cases that the very fact in controversy is whether such things were spoken, and not whether they are true."[12] And as said by Chief Justice Doster, "The rule is general that, where a substantive litigated fact is the speech of a person, one who heard the utterance is admitted to testify to it, and the testimony so received is not hearsay."[13]

§ 5. **Verbal acts which constitute part of the issue.**—Verbal acts which constitute part of the issue are original evidence and not hearsay. Some illustrations of this class of evidence are the following: (1) Where the issue is, whether a certain alleged contract was made or not. Statements by the parties to it, whether oral or written, which constitute the *making* of it, are admissible as original evidence; (2) Where the issue is, whether a slander or libel was committed or not, the oral or written statement constituting the alleged slander or libel, is admissible as original evidence; (3) Where the issue is, whether the defendant received notice or not, in order to determine the question of his liability the statement constituting the notice is admissible as original evidence; (4) Where the issue is, whether the defendant, in an action for malicious prosecution, entertained malice or not, statements made to him by third persons, and which if believed by him would tend to show that he did not, are admissible as original evidence. In none of the foregoing illustrations are the declarations used as testimonial evidence, and therefore, as to them the rule against hearsay has no application.

12—State v. Wentworth, 37 N. H., 217.

13—State Bank v. Hutchinson, 62 Kan., 9.

§ 6. Declarations which constitute a verbal part of an act material in the case.—Declarations which constitute a verbal part of an act material in the case are also original evidence. In no sense are they used testimonially; i. e., as statements to prove the truth of a fact asserted therein; and therefore, as to them, the rule against hearsay has no application. As stated by Justice Fletcher, "If a declaration has its force by itself, as an abstract statement, detached from any particular fact in question, depending for its effect on the credit of the person making it, it is not admissible in evidence. . . . But when the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. . . Such a declaration derives credit and importance as forming a part of the transaction itself."[14] And as stated by Justice Clifford, "Declarations of a party to a transaction, though he was not under oath, if they were made at the time any act was done which is material as evidence in any issue before the court, and if they were made to explain the act, or to unfold its nature and quality, and were of a character to have that effect, are treated, in the law of evidence, as verbal acts, and, as such, are not hearsay, but may be introduced, with the principal act which they accompany and to which they relate, as original evidence, because they are regarded as a part of the principal act, and their introduction in evidence is deemed necessary to define that act and unfold its true nature and quality."[15]

Some illustrations of the foregoing principle are the following: (1) Declarations made by a party who is in possession of property, where the declarations tend to show ownership in him, or otherwise; (2) Declarations made by an accused person found in possession of stolen goods; (3) Declarations made by an alleged bankrupt; (4) Declarations made by a testator affecting a revocation of his will; (5) Declarations as to domicil.

§ 7. Requisites of admissibility of declarations which constitute a verbal part of an act.—The requisites of admissibility of

14—Lund v. Tyngsborough, 9 Cush., 42.

15—Insurance Co. v. Mosley, 8 Wall., 411.

declarations which constitute a verbal part of an act are the following, viz.: (1) The declarations must be contemporaneous with the act; (2) They must limit, characterize or explain it, but merely as an aid in giving it legal significance; (3) The act must be independently material to the issue; (4) The act must be equivocal.

§ 8. **The declarations must be contemporaneous with the act.**—Declarations which constitute a verbal part of an act must be strictly and precisely contemporaneous with it. As stated frequently, "they must accompany the act." As regards spontaneous declarations, discussed *infra*,[16] the rule is more liberal. Care should be exercised in discriminating between these two classes of declarations. The former are original evidence, while the latter form a true exception to the rule against hearsay. Illustrations of the former, of which there are many, are declarations accompanying the payment or receipt of money, or the possession of land, or the delivery of a chattel.

§ 9. **The declarations must limit, characterize or explain the act.**—This class of declarations must limit, explain or characterize the act, but unless they aid in giving it legal significance they should be excluded. As stated by Professor Wigmore, they must "give *definite significance to the equivocal or indefinite conduct*, by adding a missing part. They must be such as do merely this, and not more."[17] Some courts, however, apply this rule rather loosely.

§ 10. **The act must be independently material to the issue.**—The act which is characterized by the declarations must be independently material and probable under the issues. This rule is applicable to verbal acts, but not to spontaneous declarations. Some courts, however, erroneously apply it to the latter.[18]

§ 11. **The act must be equivocal.**—It is also essential to the admissibility of verbal acts that the act which they characterize be equivocal. If this act be definite and complete, no occasion

16—Page 144, § 18 *et seq.*

17—Wigmore on Evid., Vol. III., § 1775.

18—Gresham v. Manning, Irish Rep. 1 C. L. 125. See also Wigmore on Evid., Vol. III., § 1753.

would arise for using the declarations, and therefore they should be excluded. As stated by Chief Justice Holmes, in a murder case, "The act of taking out the bullets needed no explanation; it is not the law that any and all conversation which happens to be going on at the time of an act can be proved if the act can be proved."[19] This principle, however, is frequently misapplied by the courts. It is applicable to verbal acts, but not to spontaneous declarations. As to the former, however, it is frequently ignored, and in its application many courts fail to discriminate between the two classes of declarations.

§ 12. **Declarations made by a party in possession of property.**—Declarations made by a party in possession of property, where the declarations tend to show ownership in him or otherwise, are admissible as original evidence. They characterize and elucidate the nature of the act of possession, and are, in no sense, testimonial evidence. It follows, therefore, that, as to them, the rule against hearsay has no application. As stated by Justice Storrs, "The possession of personal property is, unexplained, *prima facie* evidence of ownership in the possessor; but, as it is consistent with ownership in another, it is not conclusive; and whether the person in possession is the owner, depends, not upon the mere fact that he is in possession of it, but upon the nature and character of that possession. These are properly evinced by his conduct with regard to it; and the nature of that conduct can only be understood by the declarations accompanying it. Declarations in such cases are not, as claimed by the plaintiff, obnoxious to the objection which ordinarily applies to hearsay testimony. They are not received as declarations of third persons, to prove the truth of what is asserted; but as being of themselves acts or things done by them, and which explain or characterize the acts which they accompany, and show their true character."[20]

§ 13. **Declarations made by an accused person found in possession of stolen property.**—The declarations of an accused person found in possession of stolen goods are not hearsay but

19—Com. v. Chance, 174 Mass. 245, 250.

20—Avery v. Clemons, 18 Conn., 306, 309.

original evidence. The cases hold, however, that such declarations, to be admissible as verbal acts, must be made either before, at the time of, or within a short time after, the discovery or arrest.[21] A few cases hold that such declarations, when in favor of the accused, are inadmissible owing to "the general rule that one shall not be permitted to make evidence for himself."[22] But the better view, and the great weight of authority, are to the contrary. Justice Sheldon says, "We regard it as the well settled rule, that what explanations a person makes while in the possession of stolen property, at the time of finding it in his possession, is admissible in evidence, as explanatory of the character of his possession."[23]

§ 14. **Declarations made by an alleged bankrupt.**—Professor Wigmore says, "Perhaps the earliest, and in England the chief field, for the application of the Verbal Act doctrine has been the declarations of a debtor in connection with an alleged act of bankruptcy. Whether or not such conduct as departure from the jurisdiction, refusal to appear when a creditor calls to demand payment, or the like, amounts to an attempt to evade creditors and thus to an act justifying the judicial pronouncement of bankruptcy, depends for its total significance more or less on all the circumstances of the debtor's behavior. His declarations, therefore, at the time of this other conduct may go to define the general nature of the conduct, and thus become verbal parts of the act."[24] Mr. Christian says, "What a bankrupt declares at the time of committing an act of bankruptcy is always receivable in evidence, when proved by another person. . . But these declarations have been greatly, I conceive, misunderstood or misrepresented. They must ac-

21—Reg. v. Evans, 2 Cox C. C., 270; Comfort v. People, 54 Ill. 406 (In this case declarations of the accused, made when pledging another's watch, are held admissible to show whether or not he was exercising ownership at the time); Bennett v. People, 96 Ill., 602, 607 (In this case the court say, "what explanation a person makes while in possession of stolen property, at the time of finding it in his possession, is admissible in evidence as explanatory of the character of his possession.").

22—State v. Wisdom, 8 Port (Ala.) 511, 513, 517.

23—Bennett v. The People, 96 Ill. 602, 607.

24—Wigmore on Evid., Vol. III., § 1783.

company the act; for where words and actions are contemporaneous, they constitute one transaction, they are together one *res gestae,* and the words are evidence of the reason of the act or the intention of the actor."[24a]

§ 15. **Declarations made by a testator affecting a revocation of his will.**—Declarations of a testator affecting a revocation of his will are verbal acts and admissible as original evidence. Justice Wilde says, "All acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is therefore necessary, in each case to study the act done by the light of the circumstances in which it occurred, and the declarations of the testator with which it may have been accompanied; for unless it be done *animo revocandi* it is no revocation."[25] Justice Allen says, "Such declarations were admissible for the purpose of showing the intent with which the act was done. The act itself was consistent with an intention to revive or not to revive the earlier will. Whether it had the one effect or the other depended upon what was in the mind of the testatrix."[26]

§ 16. **Declarations as to domicil.**—When a person is in the act of moving from one place to another, declarations by him which accompany and characterize the act are admissible as verbal acts. But declarations made by him prior to his removal, and indicating an intention to move, are not admissible under this doctrine.[27] The reason is they do not form part of the act. In many cases, however, courts have erroneously held such declarations admissible under the verbal act doctrine. Originally, and in a long line of decisions, the Massachusetts courts took this view; but the tendency of the modern decisions is to hold them admissible under the doctrine of intention. The latter is the true view. In a comparatively recent case, Justice Knowlton says, "Declarations of a person accompanying a change of his abiding-place have always been held com-

24a—Christian on Bankruptcy (1812) Vol. I., 379, 380.

25—Powell v. Powell, L. R. 1 P. & D. 212.

26—Pickens v. Davis, 134 Mass. 257.

petent to explain the change as a part of the *res gestae;* but declarations in such cases are often admissible on a broader ground than as a part of the act of removing from one place to another. The intention of the person is competent to be proved as an independent fact, and anything which tends to show his intention in making the change may be shown, if it is free from objection in other particulars. . . Declarations which indicate the state of mind of the declarant naturally have a legitimate tendency to show the intention."[28] In a Massachusetts case decided half a century earlier. Justice Wilde says, "They were made in the ordinary course of business, and in relation to the defendant's removal; and they were made to the owner of the house in which he was at that time residing. This giving notice of his intended removal is to be considered an act which he might prove in any case in which it became material; and, if so, all that he said explanatory of his intention in relation to his removal, seems to us to be admissible in evidence."[29] Justice Wilde's conclusion is correct, but the ground upon which he bases it is erroneous.

§ 17. **Declarations which constitute circumstantial evidence of an existing condition.**—Declarations which indirectly evidence a condition are not within the ban of the rule against hearsay. When declarations are used inferentially they are not used testimonially; and it is only when they are used testimonially that the rule against hearsay has any application. As stated by Justice Miller, "Where the question is whether a party has acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original and material evidence, and not hearsay."[30] And as stated by Justice Colt, "The previous declarations of the testator, offered to prove the mental facts involved (competency to make a will), are competent. Intention, purpose, mental peculiarity and condition, are mainly ascertainable through the medium

27—See Wigmore on Evid., Vol. III., § 1774.

28—Viles v. Waltham, 157 Mass., 542. (In this case a notice to assessors before removing, and conversations with reference to establishing a residence after removing, were held admissible).

29—Kilburn v. Bennett, 3 Metc. 199.

30—Friend v. Hamill, 34 Md. 298, 308.

afforded by the power of language. Statements and declarations, when the state of mind is the fact to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statement is of no consequence. As a narration, it is not received as evidence of the fact stated. It is only to be used as showing what manner of man he is who makes it."[31] When the declarations are used inferentially, they are admissible to show the condition of mind of either the declarant or of *another person.* Illustrations of the former are the cases cited in foot-notes [30] and [31]. An illustration of the latter is the following: A calls B a liar, and B knocks A down. A sues B for assault and battery. The statement made by A to B is admissible to show inferentially the state of B's mind caused by the provocation. It would not be admissible, however, testimonially, i. e., to show the truth of the fact asserted. As stated by Lord Chief Baron Abinger, "If a man called another a liar, and was knocked down, the plaintiff would not be allowed to prove, on the trial of the assault, that the defendant was really and in point of fact a liar, because evidence of provocation is admitted for the purpose of showing that the feelings of the party were excited, and a man is not stung the less by a libel because it happens to be true."[32] The condition of mind, to which the declarations relate, may consist in motive, belief, knowledge, good faith, frenzy, sanity, etc.. Verbal utterances are admissible to show inferentially that a person other than the declarant had knowledge or belief as to the vicious nature of an animal; or the dangerous condition of a certain place or machine; or the falsity of certain representations; or the violent disposition of the deceased, in a murder case. In a rape case, failure on the part of the victim to make complaint raises a presumption in favor of the accused. This presumption may be rebutted by showing proper motives for keeping silent; and these motives may be shown inferentially by statements made to the victim by the accused. When a person destroys a written instrument he may still show its contents by secondary evidence, provided the destruction of the instrument was done in good faith. To show good faith, verbal utterances by another,

31—Shailer v Bumstead, 99 Mass. 112.

32—Fraser v. Berkeley, 7 C. & P., 625.

which produced it, would be admissible. In none of the foregoing cases are the declarations used testimonially.

§ 18. **Spontaneous declarations.**—Spontaneous declarations, made *immediately after* the occurrence to which they relate, constitute a real exception to the rule against hearsay. They differ essentially from verbal acts in that they are used testimonially. Some cases speak of this class of declarations as spontaneous exclamations.[33] Professor Wigmore uses this term, as he says, in default of a better one.[34] As previously stated in this chapter (§ 4), much confusion exists in the cases owing to the fact that many courts fail to discriminate between spontaneous declarations and verbal acts. A careful observance of this discrimination by courts and text-writers, would do much towards dispelling this confusion. Professor Wigmore, in his recent scholarly work on Evidence, has done much towards elucidating and emphasizing this important discrimination.

§ 19. **Grounds of admissibility.**—The chief ground of admissibility of this class of declarations is the circumstantial guarantee of trustworthiness. This guarantee is based upon the fact that the declarations are the spontaneous, instinctive and natural utterances of the declarant, "generated by an excited feeling which extends without a break-down from the moment of the event which they illustrate."[35] At the time the utterances are made the reflective faculties are dormant, so that the exclamations are genuine and sincere. They constitute instinctive expressions of the mind resulting from nervous excitement produced by some external manifestations. If the declarant has had time to deliberate, and frame his statements in his own interest, they are not spontaneous declarations, but narratives of past occurrences, and therefore inadmissible.

A minor ground of admissibility is the principle of necessity. This principle is applicable more or less to all the exceptions to the rule against hearsay. It is applicable to the exception under consideration only so far as a resort to spontaneous declarations for unbiased evidence is necessary. Such extrajudi-

33—Lauder v. The People, 104 Ill. 256; Dismukes v. State, 83 Ala., 239.

34—Wigmore on Evid. Vol. III., foot-note 1, page 2247.

35—Justice Smith, in Carr v. State, 43 Ark. 104.

cial assertions may be entitled to greater credence than is likely to be obtained from the declarant as a witness. It is to be observed in this connection that the unavailability of the declarant as a witness, in this class of declarations, is immaterial.

§ 20. **Not essential that the declarations be strictly contemporaneous.**—It is often stated that this class of declarations must be contemporaneous with the event to which they relate. This statement is misleading to say the least. It certainly is not essential that they be *precisely* contemporaneous. In regard to verbal acts, however, it is. Failure to properly discriminate between these two classes of declarations is probably the cause of the loose and misleading statements in regard to the former. Such declarations are admissible though subsequent to the occurrence to which they relate, provided they are near enough to be the result of the exciting cause and not the result of reflection and deliberation.

A marked example of the misapplication of this principle is the celebrated case of Regina v. Beddingfield.[36] In this case the accused was charged with murder. The deceased, a minute or two after the accused entered her room, came suddenly out of the house with her throat cut, and on meeting a woman in the yard said something, pointing backward towards the house. In a few minutes she was dead. Chief Justice Cockburn rejected what she said, on the ground that "it was not part of anything done, or something said while something was being done, but something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was heard." The Chief Justice wholly failed in this case to discriminate between verbal acts and spontaneous declarations. As heretofore stated, verbal acts must be *precisely* contemporaneous; but verbal acts are original evidence. Spontaneous declarations, however, do not have to be precisely contemporaneous. It is sufficient to render them admissible if they are near enough to be free from reflection and deliberation.

Two other marked examples of the misapplication of this principle are the frequently cited cases of Com. v. M'Pike[37]

36—14 Cox Cr. Ca. 341.

37—3 Cush. (Mass.) 184.

and Com. v. Hackett.[38] In both of these cases the defendants were convicted of manslaughter and alleged exceptions. In the former case, Justice Dewey, in admitting *subsequent* declarations of the deceased, says, "The period of time, at which these acts and declarations took place, was so recent after receiving the injury, as to justify the admission of the evidence as a part of the *res gestae.*" If the declarations were part of the *res gestae* they were verbal acts, and admissible as such, as original evidence. They were not verbal acts, however, since they did not accompany the main transaction. Hence, if they were admissible at all, they were admissible as spontaneous declarations, and not "as a part of the *res gestae.*" In the latter of the two cases cited, Chief Justice Bigelow falls into precisely the same error. The declaration in question was made by the deceased *shortly after* the infliction of the alleged mortal blows. In speaking of this declaration Chief Justice Bigelow says, "But it was an exclamation or statement, contemporaneous with the main transaction, forming a natural and material part of it, and competent as being original evidence in the nature of *res gestae.*" Since the statement was made *after* the blows were struck, it was not a verbal act and original evidence, but merely hearsay; and if admissible at all, it was admissible as a spontaneous declaration, which constitutes a real exception to the rule against hearsay.

§ 21. **A confusing and misleading statement by Professor Greenleaf.**—In speaking of declarations relating to the *res gestae,* Professor Greenleaf says, "There are other declarations which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and its kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances,

38—2 Allen (Mass.) 136.

constituting parts of the *res gestae*, may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge according to the degree of their relation to that fact, and in the exercise of his sound discretion it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description."[39]

The foregoing statement, it is submitted, is both confusing and misleading. It is confusing in that it wholly fails to make any discrimination whatever between verbal acts and spontaneous declarations. It is misleading in that it treats spontaneous declarations as original evidence. As stated by Professor Wigmore, "This passage, and the structure of decisions resting on it, have no basis of principle. They commit the fallacy of confusing the details of an occurrence with human assertions about those details."[40]

§ 22. **Declarations of agents.**—Much confusion is found in the cases owing to the fact that the admissibility of declarations made by agents is frequently made to depend upon the *res gestae* doctrine; when, as a matter of fact, this doctrine is usually not involved at all. The doctrine usually involved is the doctrine of admissions. And whether the agency relation existed or not is not a question in evidence, but a question in substantive law. Declarations of agents, made within the scope of the agency relation, are binding upon their principals; and whether such declarations form a part of the occurrence to which they relate or not is immaterial. Similar observations are applicable to declarations made by co-conspirators.[41]

39—Greenleaf on Evid. Vol. I. § 108.

40—Wigmore on Evid. Vol. III., § 1757, p. 2267.

41—Professor Thayer says, upon this point, "The term *res gestae* is freely used in another class of cases where the specific question is whether a party to the suit shall be affected with responsibility for the declaration of another; not merely whether it may be used as evidence against him, but whether it shall be so used as having been brought home to him, and whether he shall be chargeable with it as if it were his own. When the inquiry is whether the utterance of an agent, or a co-conspirator, is receivable against a party, and it is said, in the case of the agent, that it must have been made in and

§ 23. **Declarations in rape cases.**—The fact that the prosecutrix, within a reasonable time after the commission of an act of rape, made complaint against the accused, has always been held admissible. The origin of this rule was the ancient hue-and-cry doctrine. As stated by Bracton, "When therefore a virgin has been deflowered and overpowered, against the peace of the lord the king, forthwith and while the act is fresh she ought to repair with hue and cry to the neighboring vills and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress."[42]

§ 24. **Three theories of admissibility.**—There are three theories under which this class of declarations is held admissible, viz.: (1) To explain a self-contradiction; (2) To corroborate other evidence given by the prosecutrix; (3) As a spontaneous declaration.

§ 25. **The first theory.**—Under this theory the declarations must be offered to sustain the prosecutrix when in some man-

about the business on which the agent was employed; and while actually engaged in that business; and, of a co-conspirator, that he must have made his declaration while engaged in the common enterprise and regarding that,—in such cases it is common to express this idea by saying that the declaration must be made as a part of the *res gestae;* and if it is not so made it is deemed to be *res inter alios gesta.* Now it is obvious on a little reflection, that to settle this question adversely to the admissibility of that which is offered in evidence, is really to settle a question in the law of agency or in the law regulating conspiracy,—a question in substantive law. . . Observe, then, that the rule which says that a man shall be chargeable with the acts and declarations of his agent or fellow-conspirator is not a rule of evidence; and when in stating and applying this rule it is said that the agent's declaration must have been made in and about his principal's business, while actually engaged in it, and as a part of the *res gestae;* or again, when it is said of a conspirator's declaration, offered against his fellow-conspirator, that it must have been made while he was actually engaged in the common enterprise, about the affairs of it, and as a part of the *res gestae;* the Latin phrase adds nothing; it is used as a compact expression for *the business,* as regards which the law for certain purposes identifies the two conspirators or the principal and agent. In such cases, evidently, the declaration may be about a past fact as well as a present one, so long as it comes up to the above-named requirements." American Law Review XV., 80.

42—H. de Bracton f., 147 (1258).

ner impeached; and furthermore, the evidence must be limited to the mere fact that complaint was made. It is not essential, however, that the prosecutrix be directly impeached. She may be impeached inferentially. Thus, assuming that she testifies that the accused committed the act, a presumption of fact arises that, if her story is true, naturally she made complaint to some relative or friend soon after the commission of so violent an act. Failure to show that she made complaint would ordinarily raise a presumption of fact which would tend to impeach her. And, to rebut this natural presumption that would arise from silence on this point, the fact that she made complaint may always be shown. As stated by Justice Daggett, "If a female testifies that such an outrage has been committed on her person, an inquiry is at once suggested why it was not communicated to her friends. To satisfy such inquiry it is reasonable that she should be heard in her declaration that she did so complain."[43] And as stated in a recent case by Justice Bartch, "The natural instinct of a female thus outraged and injured prompts her to disclose the occurrence, at the earliest opportunity, to the relative or friend who naturally has the deepest interest in her welfare; and the absence of such disclosure tends to discredit her as a witness, and may raise an inference against the truth of the charge. To avoid such discredit and inference, it is competent for the prosecution to anticipate any claim as to effects, and show by affirmative proof of the victim and of her relative or friend to whom she narrated the circumstances of the outrage, that complaint was made recently after its commission."[44] Under this theory, however, the details of the declarations are not admissible. To admit them would be to admit hearsay evidence without any justification.

§ 26. **The second theory.**—This theory involves the principle which is applied by many courts in admitting in evidence subsequent declarations of a testator where the issue is the contents of his lost will. Such declarations are held admissible merely as *corroborative* evidence. In a rape case, the complaint made by the prosecutrix is admissible to cor-

43—State v. De Wolf, 8 Conn., 99. 44—State v. Neal, 21 Utah, 151, 60 Pac. Rep., 510.

roborate her testimony given on the stand. As some courts put it, "to verify" or "to test her recollection." Under this theory, as well as under the first one, it is essential to the admissibility of this class of evidence that the prosecutrix has testified in the case; and furthermore, that her testimony has been, inferentially at least, impeached. The evidence, however, is not, as under the first theory, restricted to the mere fact that complaint was made. *The details* of the complaint are also admissible. This is owing to the fact that the purpose of introducing the declarations is to show that she told the same story previously as she now tells upon the stand.

§ 27. **The third theory.**—This theory constitutes a real exception to the rule against hearsay. The declarations are hearsay, but they are held admissible because made, under the influence of mental excitement, and so near to the time of the act as to preclude premeditation. As stated by Justice Robinson, "Moreover, we think the declaration was admissible as a part of the *res gestae*. It was made but a few moments after the alleged ravishment had been accomplished, and while declarant was under the influence of the mental excitement which it produced. It was made within such time after the act to which it referred and under such circumstances as to preclude the element of premeditation."[45] Under this theory it is not essential to the admissibility of the declarations that the prosecutrix testify, or that she be in any manner impeached. Moreover, the details of the complaint, as well as the fact that complaint was made, are admissible. As stated by Chief Justice Park, "Her natural impulses prompt her to tell all the details of the transaction. Why, on the same principle, ought not her statement of the details to be evidence?"[46]

§ 28. **Much conflict in the decisions.**—The English doctrine.—There is much conflict in the decisions on the question whether the details of the declaration are admissible or not. According to the earlier English cases they were held inadmissible. The modern English cases, however, hold the con-

45—McMurrin & Rigley, 80 Ia., 325.

46—State v. Kinney, 44 Conn., 156.

trary. Baron Parke, in a case decided in 1839, says, "The sense of the thing certainly is that the jury should in the first instance know the nature of the complaint made by the prosecutrix and all that she then said. But, for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the counsel of the latter to bring before the jury the particulars of that complaint by cross-examination." [47] Justice Hawkins, speaking for the English Court for Crown Cases Reserved, after full consideration by the court, in a case decided in 1896, says, "In the result, our judgment is that the whole statement of a woman containing her alleged complaint should, so far as it relates to the charge against the accused, be submitted to the jury as a part of the case for the prosecution."[48] This is the modern English view. In this case, the court hold that such declarations are not admitted as a part of the *res gestae,* or as evidence of the truth of the things asserted, or solely for the purpose of disproving consent, but for the more general purpose of confirming the testimony of the ravished woman.

§ 29. **The American doctrine.**—In this country the cases are in hopeless conflict. Many cases hold that only the fact that the complaint was made is admissible.[49] This view is the weight of authority. Others hold that the full details of the complaint are admissible.[50] Some cases which hold the latter view base the admissibility of the details of the complaint on the doctrine of *res gestae,* while others base it on the doctrine of corroboration.

§ 30. **The true doctrine.**—The ground of admissibility of the details of the complaint depends upon the time, relatively speaking, when it was made. If contemporaneous with the

47—Regina v. Walker, 2 Moo. & Rob., 212.

48—Regina v. Lillyman, 2 Q. B. D., 167.

49—Baccia v. People, 41 N. Y., 265; Barnett v. State, 83 Ala., 40; Polson v. State, 137 Ind., 519, 523; State v. Ivins, 36 N. J. L., 233; People v. Mayes, 66 Cal., 597; People v. Duncan, 104 Mich., 460.

50—State v. Kinney, 44 Conn., 153; State v. Meyers, 46 Neb., 152; Burt v. State, 23 Ohio St., 394.

transaction, it is a verbal act, and its details are admissible as original evidence. If not contemporaneous with the transaction, but so near to it as to constitute a spontaneous declaration, its details are hearsay, but admissible under the exception of spontaneous declarations. If it constitutes a narrative of a past transaction, the *res gestae* doctrine has, of course, no application; and if the details are admissible at all, the ground of their admissibility must be the doctrine of corroboration. If the prosecutrix has not testified in the case, this doctrine has no application; and therefore, neither the fact of the complaint nor its details are admissible. If, however, the prosecutrix has testified against the accused, and the purpose of introducing in evidence the details of the complaint is to corroborate her testimony, and not to prove the truth of the fact asserted in the complaint, it seems that, upon principle, the details of the complaint, as well as the fact that she made it, should be held admissible. But, as heretofore stated, according to the weight of authority in this country the details of the complaint are excluded.

§ 31. **Declarations of bystanders.**—Declarations of bystanders, when so connected with the main fact as to characterize and form a part of it, are admissible under the *res gestae* doctrine. It is not essential, under this doctrine, that they be made by one of the actors. As stated by Chief Baron Pollock, "Courts, so far as they can, are disposed to receive in evidence whatever can throw any light on the matter in issue and advance the search after truth. No doubt, for that reason, in the case of an exclamation by any one in a crowd, when an accident occurs, and the conduct of a particular person is in question, it may be asked whether some one did not call out 'shame!'; for it is part of the *res gestae.*"[51] Nor is it essential that the declarations be made in the presence of the injured party. Thus, in a personal injury case against a railway company, the conduct of passengers, on the happening of an accident, though not in the presence of the party injured, is admissible to show how the apparent danger impressed others. As stated by Chief Justice Scates, "The conduct and

51—Milne v. Leisler, 7 H. & N., 786, 796.

exclamations of passengers in the cars were not improperly admitted, as tending to show how the circumstances of apparent danger impressed every one, and, to some degree, explain defendant's conduct, and vindicate it from rashness and imprudence from undue alarm. It is impossible for a witness to convey such scenes to the mind, and their effect and influence upon it. Such general conduct, with the exclamations involuntarily thrown out by appearances of imminent peril, may be regarded as a part of the *res gestae* for this purpose."[52]

§ 32. **The rule in criminal cases.**—The rule in criminal cases, as regards the admissibility of declarations relating to or forming part of the *res gestae*, is, generally speaking, the same as the rule in civil cases. It is to be observed, however, that preliminary matters which constitute preparation for the crime, and even subsequent acts and declarations to the main or principal act proper, but which, in a sense, form part of the continuous transaction, may be so intimately connected and interwoven with the principal act as to constitute part of the *res gestae*. But declarations which are merely narratives of past transactions are, of course, pure hearsay and inadmissible. Thus, in a recent murder case, declarations, both by the accused and by the deceased, made several minutes after the shooting occurred, and while the deceased was lying helpless on the ground where he fell, were rejected because they did not constitute part of the *res gestae*.[53] In another murder case,[54] also recently decided, declarations by the accused, made to an officer five or six minutes after the homicide was committed, and after the accused had run some distance from the scene of the murder, were rejected on the same ground. Some courts, however, apply a more liberal rule in such cases and admit such declarations, especially when made at the place where the main event occurs.[55] If the declarations are so closely connected with the main fact as to constitute in a substantial sense a part of it they are admissible as part of the

52—Galena & C. U. Ry. Co., 16 Ill., 558, 568.

53—Williams v. State, 130 Ala., 107.

54—Sullivan v. State, 101 Ga., 800.

55—Galveston &c. Ry. Co. v. Davis, 27 Tex. Civ. App., 279.

res gestae.[56] And if they are sufficiently near to constitute spontaneous declarations, and not narratives of past occurrences, they are admissible as a real exception to the rule against hearsay. Previous threats and altercations may also be so connected with the main act as to constitute part of the *res gestae*.[57]

§ 33. **The tendency of some courts to relax this exception to the hearsay rule.**—Some courts favor relaxing this exception to the hearsay rule. Moreover, they assert that this is the tendency of recent decisions. As stated by Justice Swayne, in a celebrated case, "The tendency of recent adjudications is to extend rather than to narrow the scope of the doctrine."[58] Other courts hold exactly the contrary. As stated by Chief Justice Bigelow, in another important case, "It is very true that the rule which renders *res gestae* competent, has been often loosely administered by courts of justice, so as to admit evidence of a dangerous and doubtful character, and that the tendency of recent decisions has been to restrict within the most narrow limits this species of testimony (citing Lund v. Tyngsborough, 9 Cush. 36)."[59] In another celebrated case, Justice Earl, in commenting upon Chief Justice Bigelow's view, speaks approvingly of it. In another case the court say, "To make declarations on this ground admissible, they must not have been mere narratives of past occurrences, but must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the acts they were intended to explain; and to so harmonize with them as to constitute a single transaction."[60] Upon principle, the latter view is correct; and is undoubtedly supported by the weight of authority. The principle is fundamental that a general rule which has exceptions is to be construed liberally, while the exceptions to it are to be construed strictly.

56—Keyes v. State, 122 Ind., 527; Greenfield v. People, 85 N. Y., 75; Kirby v. Com., 77 Va., 681; State v. Euzebe, 42 La. Ann., 727.

57—State v. Gainor, 84 Ia., 209; Boyle v. State, 97 Ind., 322; Jordan v. State, 81 Ala., 20; State v. Ellis, 101 N. C., 765; Wood v. State, 92 Ind., 269.

58—Ins. Co. v. Mosley, 8 Wall. (U. S.), 397.

59—Com. v. Hackett, 2 Allen (Mass.), 136, 140.

60—Rockwell v. Taylor, 41 Conn., 55.

CHAPTER XVIII.

OPINION EVIDENCE.

§ 1. **Definition.**—Opinion evidence is the statement by a witness of an inference, as to the existence or non-existence of a fact or facts in issue, and based either upon personal knowledge, or facts assumed to be true.

§ 2. **Origin.**—The practice of admitting opinion evidence is of ancient origin. Instances are recorded in the Year Books where the opinions of witnesses, versed in the arts and sciences, were allowed. As early as 1353, skillful surgeons were summoned from London to inform the court whether a certain wound was mayhem or not. In 1532, the celebrated criminal code of Emperor Charles the Fifth required the opinion of medical experts to be taken in all cases where death was supposed to have been caused by violent means. For a very considerable period the purpose of opinion evidence was to inform and aid the court; and it is probable that such continued to be its purpose for a long time after witnesses were regularly allowed to testify before the jury.

§ 3. **Opinions and facts distinguished.**—Psychologically speaking, all statements by witnesses are expressions of opinions. They differ in remoteness from the immediate impressions received, but all are conclusions drawn from perceptions received through the senses. Legally speaking, however, statements by witnesses are of two classes: (1) Facts; (2) Opinions. The dividing line between these two classes is generally clear and well defined, but there are exceptions to this rule. Spontaneous conclusions, as to conditions or appearances, drawn from perceptions resulting from a variety of circumstances which cannot be palpably described by the witness to the jury so as to enable that body to draw intelligent conclusions from them, are usually regarded, from the legal standpoint, as mat-

ters of fact and not of opinion.[1] Such conclusions may be stated by non-expert witnesses. As a general rule, however, the facts upon which the conclusions are based must first be stated; and such facts must always be founded upon personal knowledge. Thus, a non-expert witness may state his conclusions as to,—the age of a certain person; the condition of his health; his identity; his sanity; his reputation; whether he appeared intoxicated, glad, angry, nervous, excited, grief-stricken, etc.; the value, weight, size, sufficiency, color, etc., of a certain thing; the safety of a certain place or condition of things; the disposition of a certain animal; the character of certain sounds, and the direction from which they seemed to come; the speed of a certain train or horse; and whether a certain thing would tend to frighten horses. In a substantial sense, this class of evidence is evidence of facts and not of opinions. In no sense is it expert evidence, and care should be taken to avoid confusing the two classes. Real opinion evidence may be given only by an expert.

§ 4. **Expert testimony as to certain facts.**—Expert opinion evidence, and expert testimony as to certain facts, are often used interchangeably. They are not, however, synonymous terms. The former comprises the real exception to the rule which excludes opinion evidence. The latter is not opinion evidence at all, but merely evidence of facts by specially qualified witnesses. Evidence by an expert in the unwritten law of a foreign country, as to what that unwritten law is, is not expert opinion evidence, but expert evidence as to a certain

1—"The truth is, the statement of a non-professional witness as to the sanity or insanity of an individual, whose appearance, manner, habits, and conduct came under his personal observation, is not the expression of mere opinion. In form, it is opinion, because it expresses an inference or conclusion based upon observation of the appearance, manner, and motions of another person, of which a correct idea cannot well be communicated in words to others, without embodying, more or less, the impressions or judgment of the witness. But, in a substantial sense, and for every purpose essential to a safe conclusion, the mental condition of an individual, as sane or insane, is a fact, and the expressed opinion of one who has had adequate opportunities to observe his conduct and appearance is but the statement of a fact." Per Justice Harlan, Con. etc. Life Ins. Co. v. Lathrop, 111 U. S., 612, at p. 620.

fact. Evidence by a medical expert, as to the physiology of the human body, or, as to the functions of certain of its organs, and evidence by an expert, as to the meaning of certain terms peculiar to a certain trade or business, belong to the same class.

§ 5. **Expert opinion evidence.**—Expert opinion evidence is the statement by a witness, specially qualified to testify, of an opinion based upon facts either assumed or proved, concerning a matter involving scientific or technical knowledge not possessed by an ordinary witness. As indicated by the definition, to render such evidence admissible the witness must be specially qualified to give it, and the question involved must be one which requires special knowledge. If the jury are equally capable with the witness of forming an opinion from the facts stated, such evidence is inadmissible.

§ 6. **Basis of expert opinion evidence.**—Expert opinion evidence may be based upon a hypothetical question, or personal knowledge, or partly upon the one and partly upon the other. As a general rule, it is based upon a hypothetical question. It may not, as a general rule, be based upon hearsay, though the witness believes such hearsay to be true. An exception to this rule, founded upon necessity, is the case of an opinion by a physician, based, in part, upon the statements of his patient, describing his symptoms and physical condition, and the causes which have led to the disease or injury under which he appears to be suffering. It may not be based upon the inferences and conclusions of other witnesses; nor partly upon facts and partly upon the opinions of other experts. In all cases, it must be based upon personal knowledge, or, upon facts assumed to be true; and such personal knowledge and assumed facts must be pertinent to the issue. It may not, as a general rule, be based upon all the evidence in the case. This is because the jury would not know how much weight the expert witness would give to the various parts of the evidence, and hence his opinion would be valueless. An expert opinion may, however, in the discretion of the court, be based upon the evidence of one or more witnesses, provided that such evidence is not contradictory, or too complicated or obscure, and assumed to be true.

When an expert opinion is based upon personal knowledge,

the facts upon which it is based must first be stated. The reasons for this rule are,—(1) To enable the court to determine whether the facts, upon which the opinion is based, are relevant; (2) To enable the correctness of the opinion to be tested by the opinions of other experts based upon the same facts. When, however, the opinion is based upon the observation and experience of the witness *in similar cases* to the one in issue, he may not be asked, upon his direct examination, to state the facts upon which his opinion is based. The reasons for this exception to the rule are,—(1) To avoid introducing side issues, and thereby confusing the jury; (2) To prevent the trial of the cause from becoming unduly prolonged, and the costs from becoming unnecessarily burdensome. Several experts might give opinions based upon different sets of similar circumstances to those in issue, and if all these different sets of circumstances were allowed to be given in evidence, and controverted by the adverse party in each case, the issues would be so complicated that the minds of the jurors would be in a state of chaos.

§ 7. **An expert witness.**—An expert witness is one who is skilled in some art, science, trade, profession, or other human activity, and possesses peculiar knowledge concerning it.[2] This peculiar knowledge may be the result of study, or of experience. It is not essential that his attainments, in the particular subject to which his opinion relates, are of the highest order, nor that he is engaged at the time in the particular activity which it concerns. His competency to testify as an expert is a preliminary question for the court; and the weight to be given his opinion, a question of fact for the jury. One expert may testify to the qualifications of another expert, provided his testimony is based upon personal knowledge; but the qualifications of the witness as an expert must be impeached before the opinions of other experts, *in favor* of his qualifications, are admissible. The

2—The terms art and science, as used in the definition of an expert witness, are interpreted in the broad sense. As said by Davis, J.: "Art, in its legal signification, embraces every operation of human intelligence whereby something is produced outside of nature; and the term 'science' includes all human knowledge which has been generalized, and systematized, and has obtained method, relations and forms of law." Atchison Ry. Co. v. U. S., 15 Court of Claims, 140.

evidence of an expert may be impeached by showing that, upon a prior occasion, he expressed a contrary opinion; and also by showing that his qualifications as an expert are weak and imperfect. If the witness is found by the court to be competent as an expert, the impeaching evidence must be directed to the jury with the view of affecting the weight of his evidence. An expert witness, who gives opinion evidence, may always be asked the reasons for such opinion.

§ 8. **The hypothetical question.**—A hypothetical question is one which assumes the truth of certain allegations contained in it. Its data must be within the scope of the evidence in the case, except when given in cross-examination for the purpose of testing the skill and accuracy of the expert witness. If there is any evidence tending to prove the facts assumed, the question should be allowed. If, however, the facts assumed are clearly an exaggeration of the facts in evidence the question should be excluded. A hypothetical question is not objectionable merely because it is long.[3] It may, however, be objectionable because

3—The following hypothetical question, propounded by counsel for the defendant in the celebrated Guiteau trial, was allowed: "Assuming it to be a fact that there was a strong hereditary taint of insanity in the blood of the prisoner at the bar; also that at about the age of thirty-five years his own mind was so much deranged that he was a fit subject to be sent to an insane asylum; also that at different times after that date, during the next succeeding five years, he manifested such decided symptoms of insanity, without simulation, that many different persons conversing with him, and observing his conduct, believed him to be insane; also that in or about the month of June, 1881, at or about the expiration of said term of five years, he became demented by the idea that he was inspired of God to remove by death the President of the United States; also that he acted on what he believed to be such inspiration, and as he believed to be in accordance with the Divine will in the preparation for, and in the accomplishment of, such a purpose; also that he committed the act of shooting the President under what he believed to be a Divine command which he was not at liberty to disobey, and which belief made out a conviction which controlled his conscience and overpowered his will as to that act, so that he could not resist the mental pressure upon him; also that immediately after the shooting he appeared calm and as if relieved by the performance of a great duty; also that there was no other adequate motive for the act than the conviction that he was executing the Divine will for the good of his country—assuming all of these

it includes allegations that should be excluded, or because it excludes allegations that should be included. It may also be objectionable because too complicated, and for this reason tend to confuse and mislead the jury. It is not objectionable merely because it is not based upon all the facts brought out in the evidence. If, however, it unduly emphasizes certain favorable ones, it should be modified or excluded. An improper ruling by the court, in overruling an objection to a hypothetical question because it contains data not brought out in the evidence, may be cured by additional evidence brought out in the cross-examination. To entitle a party, on appeal, to the benefit of an improper ruling by the court, where the improper ruling is not subsequently cured, the ground of his objection must be specifically stated. A hypothetical question, whose data include the conclusions and inferences of other witnesses, is objectionable. Such a question must assume facts and not opinions. A hypothetical question, whose purpose is to elicit from the expert an answer to a question of law, is also objectionable.

§ 9. **Compensation of expert witnesses.**—Whether an expert witness may refuse to give opinion evidence without extra compensation is a question upon which the courts do not agree. In some states, including Illinois, an expert, called solely as such, and knowing nothing of the facts of the case, may be required to testify without extra compensation. In other states the contrary has been held, on the ground that the special knowledge of the expert is in the nature of property. In England, extra compensation is allowed. The federal courts seem to favor the English rule. Writers on medical jurisprudence strongly favor the English rule.[4] In several of the states the matter is regulated by statute. Most of the statutes

propositions to be true, state whether, in your opinion, the prisoner was sane or insane at the time of shooting President Garfield?"

Guiteau's delusion was an erroneous conclusion from disputable facts, and held no defense. Irrational opinions in regard to questions of politics, law, or religion, are not insane delusions. An insane delusion is never the result of reasoning or reflection. Insanity is a disease of the mind rendering the person incapable of entertaining a criminal intent.

4—"It is evident that the skill and professional experience of a man are so far his individual capital and property that he cannot be compelled to bestow it gratuitously upon any party. Neither

provide for the payment of extra compensation. In Indiana, the statute provides the contrary;[5] but, before the statute was passed, the supreme court of that state decided that a physician could not be compelled to give expert opinion evidence without extra compensation, and that a refusal to do so was not a contempt.[6] All the courts agree that an expert cannot be compelled to make a preliminary or *post mortem* examination without special compensation, nor be compelled to attend throughout the whole trial for the purpose of listening to the testimony.

§ 10. **Number of expert witnesses allowable.**—The number of expert witnesses which may be called upon to testify in a case is a matter which rests in the sound discretion of the court. Each case depends upon its own peculiar circumstances. As a general rule, three to five constitute a reasonable number.

§ 11. **By whom expert witnesses are chosen and paid.**—In England, and in this country, the parties to the suit select their own expert witnesses and pay them for their services. In some countries, including France and Germany, they are not permitted to do so. In France, expert witnesses are selected by the court; and in Germany they must be specially authorized by the government to give expert evidence. In some states, including Massachusetts, there are statutes which provide for the payment, out of the public treasury, of special compensation to experts employed by the state in criminal cases. Under these statutes it has been held that, in the interests of justice, experts may be summoned for the defence, by the consent of the prosecuting attorney, and special compensation paid to

the public, any more than a private person, have a right to extort services from him, in the line of his profession, without adequate compensation. On the witness stand, precisely as in his office, his opinion may be given or withheld at pleasure; for a skilled witness cannot be compelled to give an opinion, nor committed for contempt if he refuse to do so. Whoever calls for an opinion from him in chief is under obligation to remunerate him, since he has to that extent employed him professionally; and the expert, at the outset, may decline giving his opinion until the party calling him either pays him or agrees to pay him for it." Ordonaux's Jurisprudence of Medicine, § 114.

5—Indiana Rev. St. (1881), p. 94, § 504.

6—Buchanan v. State, 59 Ind., 1.

them out of the public treasury.[7] In many of the states, irrespective of statutes, it has been the practice, in criminal cases, to summon experts to testify on behalf of the prosecution, and to pay them a reasonable amount for their services out of the public treasury. When one of the parties to a suit summons an expert who testifies on his behalf, and the costs of the suit fall upon the adverse party, such party will not be required to pay the extra compensation for the services of the expert.

Experts, who are called to give opinion evidence, are permitted to remain in the court room during the examination of ordinary witnesses; but the rule, both in England and in this country, requires that they withdraw and come in for examination one at a time.

§ 12. **Proof of handwriting by non-experts.**—A non-expert witness is competent to testify to the genuineness of a person's handwriting, provided, (1) He has ever seen him write, even only once; or, (2) Has received a letter from him in reply to one sent; or, (3) Has seen a signature which the person has acknowledged as his; or, (4) Has had the person's letters pass through his hands in the ordinary course of business, or has become familiar with his handwriting in the performance of official duties. The knowledge of the non-expert, however, must be acquired under circumstances which will not tend to bias his mind. If it has been acquired after the genuineness of the handwriting in issue has been disputed, and with the view of testifying upon this point in the case, the testimony is inadmissible.

§ 13. **Proof of handwriting by experts.**—An expert in handwriting is one "who has really acquired actual skill and scientific knowledge upon the subject." Some courts interpret the term more liberally than others. It includes tellers and cashiers in banks, brokers, notaries, book-keepers, writing masters, clerks in post offices, etc. . An expert may give opinion evidence as to the genuineness of handwriting; whether it is a simulated hand or not; as to which of two writings which cross each other was written first; and, as to the question of priority in the case of alterations or interlineations. In the case of

7—Attorney - General Petitioner, 104 Mass., 537.

ancient documents, some courts allow experts to state their opinion as to the probable periods at which they were written, but the weight of authority is to the contrary.

§ 14. **Proof of handwriting by comparison.**—There are two ways of proving handwriting by comparison. One is by comparing the disputed writing with an exemplar formed in the mind of the witness, and based upon personal knowledge. The other is by comparing the disputed writing with another one admitted or proved to be genuine. A comparison by the former method may be made by a non-expert. A comparison by the latter method may be made only by an expert, and by the court or jury. At the English common law, however, a comparison by an expert, by juxtaposition, was not allowable except in the case of ancient documents; but it has always been allowable in the ecclesiastical courts. In 1854, Parliament extended the rule, in civil cases, to the common law courts; and in 1865, to criminal cases. A comparison by the court or jury has always been allowable. In this country, the courts, as regards allowing a comparison by experts, are not at all in harmony. In most of the states, a comparison by an expert is allowable, provided the writing which is admitted, or proved to be genuine, is relevant to the issue for some other purpose. In a minority of the states such evidence is allowable irrespective of such provision. In a few states, including Illinois, Pennsylvania and Maryland, a comparison of handwriting by experts, by juxtaposition, is not allowable at all. In several of the states, statutes have been passed expressly providing for the admission of such evidence. In most of the states a comparison may be made by the jury; but in Tennessee and Kentucky this has been disallowed.

§ 15. **Comparison of a disputed handwriting with copies.**—Photographic copies of handwriting, and letter-press copies, are secondary evidence, and may not be used in any case for the purpose of comparison, unless a proper foundation has first been laid by properly accounting for the absence of the original. Even then, they are very generally considered by the courts as unsafe guides, and for this reason are usually excluded. In a few exceptional cases, however, they have been allowed.[8]

8—Marcy v. Barnes, 16 Gray, 160.

PART III.

REAL EVIDENCE.

CHAPTER I.

INSPECTION AND VIEW BY COURT AND JURY.

§ 1. **Classification and definitions—early view.**—The earlier writers divide real evidence into the following two classes: (1) Immediate real evidence; (2) Reported real evidence. Bouvier defines real evidence as "Evidence of which any object belonging to the class of *things* is the source, *persons* also being included in respect of such properties as belong to them in common with things." He also adds, "This sort of evidence may be either *immediate*.....or *reported.*"[1] Best, who also uses the term in this broad sense, defines these two divisions as follows: "Immediate real evidence is where the thing which is the course of the evidence is present to the senses of the tribunal"[2] "Reported real evidence is where the thing which is the source of the evidence is not present to the senses of the tribunal, but the existence of it is conveyed to them through the medium of witnesses or documents."[3] Best's classification and definitions are quoted with approval by the Supreme Court of Illinois.[4]

§ 2. **Modern use of the term—definition.**—As generally understood and used today, the term "real evidence" has a more restricted meaning than formerly. As used now, it is practically synonymous with the term "immediate real evidence" as used in earlier times. The term "reported real evidence" is con-

1—Bouvier's Law Dict., p. 827.
2—1 Best on Evid. (Morgan's ed.), sec. 197.
3—1 Best on Evid., sec. 198.
4—Springer v. City of Chicago, 135 Ill. 552.

fusing and misleading, and it would be well if it were to drop out of use altogether. There are three modes by which tribunals may acquire knowledge upon which to base their decisions. These modes are: (1) Testimonial evidence; (2) Circumstantial evidence; and (3) Real evidence. Real evidence, as understood to-day, and as previously defined in this volume (page 2), is "Evidence acquired directly by the court or jury themselves, through the medium of their own senses, by an inspection of the subject-matter itself." Professor Wigmore designates this class of evidence "Autoptic Proference."[5] This is certainly a novel appellation to say the least. Some writers, including Chief Baron Gilbert, call it "Self-evidence."[6]

§ 3. **The general rule.**—Real evidence which is relevant to the fact or facts in issue is admissible unless there exists some good reason for excluding it. Generally speaking, however, its admissibility rests largely in the discretion of the trial court; and courts of review are slow to interfere on this point; but where the evidence is irrelevant, and tends to prejudice the adverse party, its admissibility may result in a reversal.

§ 4. **Origin and development of the rule.**—The rule which allows real evidence to be admitted is of ancient origin. Professor Thayer says, "Nothing is older or commoner in the administration of law, in all countries, than the submission to the senses of the tribunal itself, whether the judge or jury, of objects which furnish evidence. The viewing of the land by the jury, in real actions, of a wound by the judge, where mayhem was alleged, and of the person of one alleged to be an infant, in order to fix his age, the inspection and comparison of seals, the examination of writings, to determine whether they are 'blemished,' the inspection of the implements with which a crime was committed, or of a person alleged, in a bastardy proceeding, to be the child of another, are a few illustrations of what may be found abundantly in our own legal records and text-books for seven centuries past. . . .

5—Wigmore on Evid., Vol. II., p. 1344.

6—Wigmore on Evid., Vol. II., p. 1345.

Many of the things which were formerly submitted to the inspection of the judges only, have now passed over to the jury. . . . When the jury draw inferences from what is presented to their senses out of court, and even in court, it has been thought that the judge cannot grant a new trial on the grounds above named, because he cannot know all the evidence. But the courts, in general, have not found any insuperable difficulty in such cases."[7]

§ 5. **Application of the rule in civil cases.**—Real evidence is admissible in both civil and criminal cases. Among the earliest examples of its recognition in civil cases are, the view of realty;[8] inspection of a widow who professes to be pregnant where such a condition is essential to her right to inherit; inspection of a person who alleges infancy as a defence; inspection to determine identity; inspection of torn clothing or an injured part of the body in an action for negligence;[9] inspection of the child in a bastardy case to determine paternity.[10]

§ 6. **Application of the rule in criminal cases.**—Among the many examples to be found in the books of the use of real evidence in criminal cases are, burglars' tools;[11] stolen property;[12] surgical instruments for performing abortion;[13] weapons of various kinds;[14] bloody and torn clothing;[15] mutilated members of the deceased; bones of the deceased;[16] injured members of the complaining witness; inspection of victim in a rape case to determine whether she was under the age of consent or not.[17]

7—Thayer's Cases on Evid. (2nd ed.), p. 720.

8—Springer v. City of Chicago, 135 Ill., 552; H. de Bracton fol. 315 (1258).

9—Tudor Iron Works v. Weber, 129 Ill., 535.

10—Scott v. Donovan, 153 Mass. 378; Kelly v. State, 133 Ala. 195.

11—State v. Ellwood, 17 R. I., 763; Foster v. People, 63 N. Y., 619.

12—Gindrat v. People, 138 Ill., 103.

13—Com. v. Brown, 121 Mass., 69.

14—Sibery v. Smith, 133 Ind., 677; Com. v. Brown, 121 Mass. 69; Spies v. People, 122 Ill., 236.

15—Story v. State, 99 Ind., 413; People v. Fernandez, 35 N. Y., 49; Painter v. People, 147 Ill., 444.

16—Turner v. State, 89 Tenn., 547, 564.

17—Com. v. Hollis, 170 Mass., 433; Jones v. State, 106 Ga., 365.

§ 7. **Photographs, maps and models.**—Photographs, maps and models are frequently used as real evidence. As a general rule, photographs are secondary evidence; but in some cases they are primary evidence. Preliminary evidence of their correctness is essential to their admissibility. They are admissible to show the appearance of a person, thing or place; to identify a person, thing or place; or to identify a document or record. Thus, they are admissible to show the appearance of a person after an assault;[18] to show the appearance of a railroad wreck after a collision;[19] to show the scene of a murder,[20] or of an accident;[21] to identify a scarred corpse.[22] What are known as Roentgen or X-ray photographs have been held admissible,[23] and so have stereoscopic views.[24] The mere fact that a photograph is an enlarged one does not render it inadmissible.[25] Photographs are admissible to prove handwriting, as a general rule, but the cases upon this point are in conflict.[26] By the weight of authority, however, photographs are inadmissible as standards of comparison to prove handwriting.[27]

Maps and models have frequently been admitted as real evidence.[28] Two things are essential to their admissibility: (1) They must be authenticated; and, (2) That which they represent must be relevant to the case. Maps to be admissible need not be official;[29] but if unofficial, the witness must possess personal

18—Franklin v. State, 69 Ga., 36, 42.

19—Boch v. Iowa Cent. Ry. Co., 112 Ia., 241; Kan. City, etc., Ry. Co. v. Smith, 90 Ala., 25.

20—Com. v. Chance, 174 Mass., 245; People v. Pustolka, 149 N. Y., 570.

21—Carey v. Hubbardson, 172 Mass., 106; Baustian v. Young, 152 Mo., 317.

22—Udderzook v. Com., 76 Pa. St., 340.

23—Mauch v. Hartford, 112 Wis., 40; Haynes Murder Trial, 56 Alb. Law Journal, 309.

24—German Theo. School v. Dubuque, 64 Ia., 736.

25—Howard v. Ill. Trust Bank, 189 Ill., 569; United States v. Ortiz, 176 U. S. 422. *Contra*, White Sewing Mach. Co. v. Gordon, 124 Ind., 495.

26—Maclean v. Scripps, 52 Mich., 214; 15 Am. & Eng. Enc. of Law, 274. See also note in 75 Am. St. Rep., 476.

27—Greer v. Missouri, etc., Ry. Co., 134 Mo., 85; Tome v. Parkersburg, etc., Co., 39 Md., 36.

28—Penn. Coal Co. v. Kelly, 156 Ill., 9; Donohue v. Whitney, 133 N. Y., 178; Weld v. Brooks, 152 Mass., 297; Whitehead v. Ragan, 106 Mo., 231.

29—Justen v. Scharf, 175 Ill., 45.

knowledge of the places represented by them.[30] Diagrams, charts, plans and sketches are governed by the same rules.[31]

§ 8. **Mechanical contrivances. Inventions.**—Mechanical contrivances have also been frequently admitted as real evidence. Such contrivances, however, may be of such a nature as to make their use as such impracticable. Their admissibility in doubtful cases rests in the discretion of the court. Sometimes mechanical contrivances are introduced in evidence and put in operation before the tribunal. In suits for infringements of patents the patented articles are frequently introduced as real evidence. Where the article is too bulky to introduce in evidence, the court may order the master in chancery to make an examination and report.

§ 9. **View by jury. Discretion of court.**—From the earliest times to the present, a view by the jury, in the discretion of the court, has always been allowable. It is applicable to all kinds of property, both real and personal, where a view is essential to the proper understanding of it. It is equally allowable in both civil and criminal cases. Statutes regulate it in practically all jurisdictions, but it existed in its entirety at the English common law. Justice Craig says, "If the parties had the right upon the trial to prove by oral testimony the condition of the property at the time of the trial, . . . upon what principle can it be said the court could not allow the jury in person to view the premises and thus ascertain the condition thereof for themselves? . . . If a plat or photograph of the premises would be proper evidence, why not allow the jury to look at the property itself, instead of a picture of the same? There may be cases where a trial court should not grant a view of premises where it would be expensive, or cause delay, or where a view would serve no useful purpose; but this affords no reason for a ruling that the power to order a view does not exist or should not be exercised in any case. . . . If at common law, independent of any English statute, the Court had the power to order a view by the Jury (as we think it plain the Court had

30—People v. Johnson, 140 N. Y., 350; Com. v. Switzer, 134 Pa. St., 388.

31—Clapp v. Norton, 106 Mass., 33; People v. Johnson, 140 N. Y., 350.

such power), as we have adopted the common law in this State, our Courts have the same power."[32]

It is to be observed, however, that a view by the jury which has not been authorized by the court will be of no avail. Knowledge based upon such a view may not be used. Justice Mitchell says, "The theory of jury trials is that all information about the case must be furnished to the jury in open court, where the judge can separate the legal from the illegal evidence, and where the parties can explain or rebut; but if jurors were permitted to investigate out of court, there would be great danger of their getting an erroneous or one-sided view of the case, which the party prejudiced thereby would have no opportunity to correct or explain."[33] Formerly, it was the custom for the jury to obtain a view before the trial, and even before the final selection of the jury; but the practice now is for the jury to obtain it after the panel is complete, and after the trial begins.[34]

§ 10. **The objection raised to a view.**—Some courts repudiate the doctrine of allowing the jury to obtain a view on the ground that such evidence cannot be put into the record in the case of an appeal. As said by Justice Downey, "It is urged . . . that in no case where the jury has had a view of the place in which any material fact occurred . . . can the evidence be got into the record, as it would be impossible to put into the bill of exceptions the impressions made upon the minds of the jury by such view; and that in this way all benefit of appeal to this Court, so far as any question is concerned which depends upon all the evidence being in the record, would be wholly cut off."[35] According to the great weight of authority, however, a view by the jury is allowable, in the discretion of the court. Unfortunately, some of these courts sustain it upon an erroneous ground. This erroneous ground is, that a view by the jury is not to obtain evidence but, as Justice Cole says, "to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the wit-

32—Springer v. City of Chicago, 135 Ill., 553, 561.

33—Aldrich v. Wetmore, 52 Minn., 164, 172.

34—Lord Chief Justice Mansfield, in Rules for Views, 1 Burr., 252.

35—Jeffersonville M. & I. Ry. Co. v. Bowen, 40 Ind., 548.

nesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case."[36] The true doctrine, however, is, that the knowledge obtained by the jury in taking a view is to be used by them as evidence in the case, and not merely to enable them "the more intelligently to apply the testimony to the issues on trial before them." As stated by Justice Lyon, "The object of a view is to acquaint the jury with the physical situation, conditions, and surroundings of the thing seen. What they see they know absolutely."[37] And as said by Justice Henshaw, "If, for example, it were material to determine whether a hole in the panel of a door was or was not caused by a bullet, it would be permissible to remove the panel, to bring it into the court room, offer and have it received in evidence, and submit it to the inspection of the jury. It would not for a moment be doubted, if this procedure were adopted, but that the physical object was evidence in the case. If, instead of so doing, the Court should direct that the place where the material fact occurred should be viewed by the jury, and the jury should be conducted to the spot, and the panel of the door pointed out to them, would it be any the less the reception of evidence because obtained in this way? Certainly not."[38] It does not follow, however, that, because knowledge obtained by the jury upon taking a view is evidence which cannot be entered in the bill of exceptions, such evidence must be rejected. The demeanor and appearance of a witness cannot be put in the record, but this fact does not prevent an appeal being taken. Moreover, it should be borne in mind that courts of appeal do not weigh the evidence.

§ 11. **The objection of undue prejudice.**—The introduction of real evidence sometimes has a tendency to produce prejudice against the defendant in the minds of the jury. This prejudice may arise in either a civil or criminal case.[39] Upon this ground, objection to the admissibility of real evidence has frequently

36—Close v. Samm, 27 Ia., 508; Wright v. Carpenter, 49 Cal., 607, 609.

37—Washburn v. Ry. Co., 59 Wis., 364, 368; City of Springfield v. Dalbey, 139 Ill., 34.

38—People v. Milner, 122 Cal., 171.

39—Gentry v. McGinnis, 3 Dana (Ky.), 382, 386.

been made. The mere fact, however, that the introduction of real evidence in the case may tend to prejudice the jury against the defendant is not a sufficient ground for excluding it.[40]

There are two classes of cases where this objection is frequently made. One is where the defendant is charged with crime, and the other where damages are sought against him in a civil case for personal injuries. The contention is made that the exhibition before the jury, of ghastly wounds, bloody clothes, dangerous weapons, etc., tends to unduly excite their pity for the unfortunate victim, and correspondingly unduly excite their prejudice against the defendant. As said by Justice Coleman, "Human feelings are easily excited by the description of great bodily injuries or ghastly wounds or the exhibition of objects which appeal to the senses. Sympathy or indignation, once aroused in the average juror, readily becomes enlisted, to the prejudice of the person accused as the author of the injury."[41] In civil cases this danger is of greater frequency than in criminal cases; especially where the defendant is a corporation or a capitalist. It is to be observed, however, that real evidence is the most natural and the most efficient of all evidence; and furthermore, that in the great majority of cases where objection is made to it the apprehension is for the most part groundless. Upon the whole, therefore, courts very generally overrule the objection.[42]

§ 12. **The objection of indecency or other impropriety.**— The mere fact that the exhibition savors of indecency will not necessarily justify its prohibition. As said by Professor Wigmore, "When justice and the discovery of truth are at stake,

40—Warlick v. White, 76 N. C., 175, 179.

41—Louisville, etc., Ry. Co. v. Pearson, 97 Ala., 211, 219.

42—Spies v. People, 122 Ill., 236; Painter v. People, 147 Ill., 444, 465; Keating v. People, 160 Ill., 480; Henry v. People, 198 Ill., 162; C. C., etc., Ry. Co. v. Patton, 203 Ill., 376; Turner v. State, 89 Tenn., 547, 564 (murder case; deceased's ribs and vertebra exhibited); Tudor Iron Works v. Weber, 129 Ill., 535, 539 (plaintiff's torn clothing exhibited); Lanark v. Dougherty, 153 Ill., 163, 165 (plaintiff's injured limb examined by physician in jury's presence); People v. Sutherland, 104 Mich., 468 (wounds exhibited); Chicago, etc., Ry. Co. v. Clausen, 173 Ill., 100 (rupture exhibited); McGuff v. State, 88 Ala., 147 (rape case; inspection of the prosecutrix allowed).

the ordinary canons of modesty and delicacy of feeling cannot be allowed to impose a prohibition upon necessary measures. If such matters were not unshrinkingly discussed and probed, many kinds of crime would remain unpunished. Nevertheless, needless offence to feelings of delicacy, especially by public exhibitions before idle spectators having no responsibility for the course of justice, may well be avoided."[43] The tendency of the courts is to allow such evidence, provided a reasonable necessity exists for it, but to require the inspection to occur in the sole presence of the tribunal and the parties concerned.

Repulsive exhibitions are prohibited by the courts unless a reasonable necessity exists for them. Thus, an offer to exhibit before the jury a section of a human body, cut from a woman about the size and age of the plaintiff, for the purpose of showing the character of rib and breast-bone formation, was rejected on the ground that the proffered exhibit was "of doubtful utility and offensive in its nature."[44] In another case, in order to show the effect of strychnia upon dogs, an offer was made to bring dogs into the court-yard and kill them by strychnia before the jury, but the court rejected the offer.[45] Courts also frown upon offers to have the jurors sample alleged intoxicating liquor to determine its intoxicating nature.[46] They have gone to the extent of refusing to allow the jurors to examine and smell bottles of whisky.[47] On the other hand, jurors have been allowed to taste cider to determine whether it was "hard" or not.[48]

§ 13. Voluntary exhibition of the person in personal injury cases.—For the purpose of showing the extent and character of the plaintiff's injuries, an exhibition of them before the jury, in personal injury cases, is quite common.[49] As previously stated (§ 10), such evidence does not deprive the defendant

43—Wigmore on Evid., Vol. II., § 1159.

44—Knowles v. Crampton, 55 Conn., 336, 341.

45—Regina v. Palmer, Annual Register, 1856, pp. 422, 473, 475.

46—Com. v. Brelsford, 161 Mass., 61, 63.

47—State v. Coggins, 10 Kan. App., 455.

48—People v. Kinney, 124 Mich., 486.

49—Tudor Iron Works v. Weber, 129 Ill., 535; Keith v. New Hampshire, etc., Co., 140 Mass., 175, 180; Longworthy v. Green, 95 Mich., 93, 96.

of any material right on appeal, and it is very material in personal injury cases in showing the extent and character of the injuries received.

§ 14. **Compulsory examination of the person in civil cases.**— Whether or not courts have authority to compel the exhibition of an injured part of the body to the jury in a civil case is a question upon which the decisions are in conflict. The Supreme Court of the United States has repudiated such authority. Justice Gray says, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country."[50] This decision, however, is not in harmony with the prevailing doctrine. By the great weight of authority a compulsory examination of the person is allowable. For a time the courts of several states, including Illinois, followed the rule laid down by Justice Gray; but most of these courts, including the Supreme Court of Indiana, have repudiated that rule. A recent decision by this court holds that the cases establish the following propositions:

"That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; that a defendant has no absolute right to demand the enforcement of such order, but

50—Union Pacific Ry. Co. v. Botsford, 141 U. S. 250. For a scathing criticism of the decision in this case, see Wigmore on Evid., Vol. III., § 2220, pp. 3019, 3020, 3021.

the motion therefor is addressed to the sound discretion of the court; that the exercise of such discretion is reviewable on appeal, and correctible in cases of abuse; that the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts which can only be disclosed, or fully elucidated by such an examination and such an examination may be made without danger to the plaintiff's life or health, or the infliction of serious pain; that the refusal of the motion, when the circumstances appearing in the record present a reasonably clear case for the examination under the rules stated is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; that such an order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding.''[51]

§ 15. **When application for an order for a compulsory examination should be made.**—When, in a personal injury case, the defendant desires that a physical examination of the plaintiff be made, his application to the court for an order should be made in due time. What constitutes due time depends in a measure upon the circumstances of the particular case. As a general rule, the application should be made a reasonable time before the beginning of the trial.[52] When not so made the court may deny the application. Even the day before the trial has been held too late.[53] On the other hand, such an application has been granted when made after the trial had begun.[54] The safest rule is to make it in ample time. The question is one which rests largely in the discretion of the court.

§ 16. **Mode of examination.**—In some cases statutes provide the manner of conducting such examinations. When they do not, the court should specify in its order how, and where, the

51—City of South Bend v. Turner, 156 Ind., 418, 428, 60 N. E. R. 271, 54 L. R. A. 396, 83 Am. St. Rep., 200.

52—Aspy v. Botkins, 160 Ind., 170; So. Kan. Ry. Co. v. Michaels, 57 Kan., 480; Chadron v. Glover, 43 Neb., 737.

53—Kinney v. Springfield, 35 Mo. App., 97.

54—Schroeder v. Chicago, etc., Ry. Co., 47 Iowa, 381.

examination is to be made.[55] Unnecessary exposure of the person or inconvenience should be avoided.[56] It is customary to require that the examination be made in the presence of one or more experts named or appointed by the court.[57] In case an examination would endanger the plaintiff's life or health, the application should be denied.[58] It is customary for the court to allow each party to have one or more representatives present.[59] If the examination savors strongly of indecency or repulsiveness, it should be made in the presence of only those parties immediately concerned.[60]

§ 17. **Mode of enforcing the order.**—As a general rule, courts do not enforce this sort of an order by inflicting punishment as for a contempt;[61] but they enforce it indirectly by dismissing the plaintiff's action or by refusing to permit him to testify in the case. It has been held, however, that, in a proper case, he may be punished as for contempt.[62]

§ 18. **Compulsory examination of the person of the accused in a criminal case.**—In England, it is well settled that the accused in a criminal case may not be compelled to submit to an examination of his person.[63] The reason for this rule is, he has the right to refuse to furnish incriminating evidence against himself. The English rule has been very generally followed in this country.[64] It has been held, however, that where the question of the defendant's identity is raised he may be compelled to exhibit his arm to the jury in order to determine whether it bears certain marks as testified to by a witness.[65]

55—McGovern v. Hope, 63 N. J. L., 76.

56—Aspy v. Botkins, 160 Ind., 170.

57—Mo. Pac. Ry. Co. v. Johnson, 72 Tex., 95; Richmond, etc., Ry. Co. v. Childress, 82 Ga., 719.

58—O'Brien v. La Crosse, 99 Wis., 421; Strudgeon v. Sand Beach, 107 Mich., 496.

59—McGovern v. Hope, 63 N. J. L., 76.

60—Hale's Pleas of the Crown, I., 635.

61—City of South Bend v. Turner, 156 Ind., 418, 428.

62—Schroeder v. Ry. Co., 47 Ia., 375, 376 (a leading case against the doctrine that plaintiff may assert the privilege of refusing to allow an inspection).

63—Agnew v. Jobson, 13 Cox Crim. Cas., 625.

64—People v. McCoy, 45 How. Pr. (N. Y.), 216; State v. Garrett, 71 N. C., 87; Blackwell v. State (Ga.), 3 Crim. L. Mag., 393.

65—State v. Ah Chuey, 14 Nev., 79, 33 Am. Rep., 530.

§ 19. Examination of the person of the prosecuting witness.—In a rape case, the defendant may not insist as a matter of right that the prosecuting witness submit to an examination of her person by medical experts. If in any case such an examination is compellable, it is a matter which rests in the court's discretion.[66] On the other hand, in a criminal prosecution for an assault, the prosecuting witness may be compelled to exhibit his injuries to the jury, at the instance of the accused.[67]

§ 20. Compulsory examination of the person where impotency is alleged as the ground for a divorce.—In proceedings for a divorce on the ground of impotency it is well settled, both in England and in this country, that the court may compel an examination of the party whose impotence is alleged.[68] This party usually is, of course, the defendant. If the exigencies of the case require it, however, the court has the power to order an examination of the person of the party instituting the suit. If the court has good reason for believing that the party who makes the application for the order is acting in bad faith, the application will be denied.[69] Bishop says, "In proper cases, to aid the proofs of impotence, the Court appoints professional persons to examine the private parts of the parties and report to it whether or not the woman presents indications of her having had connection with man. It requires them to submit to such examination. The examiners are under oath, and are *quasi* officers of the tribunal for that purpose. This is termed inspection of the person. The parts concerned in this controversy being always and properly concealed from public observation, if there was no method by which inspection could be compelled, justice would in many instances fail. Therefore, in England, Scotland, France and probably every other country where this impediment to marriage is acknowledged, the Courts have required the parties, when necessary, to submit their persons to such an examination. . . . The necessity for this proceeding is in our States precisely the same as in England whence our laws are derived. Consequently it is

66—McGuff v. State, 88 Ala., 147, 16 Am. St. Rep., 25.

67—King v. State, 100 Ala., 85.

68—Countess of Essex's Case, 2 How. St. Tr. 785, 803; Anon., 89 Ala., 291.

69—Anon., 35 Ala., 226, 228.

adapted to our situation and circumstances; and, within the established rules, it should be deemed a part of our unwritten law. . . The result is that it is acknowledged in every State from which we have decisions, except Ohio, and it may well be deemed to be American doctrine."[70]

§ 21. **Weight to which real evidence is entitled.**—Of the three modes by which tribunals may acquire knowledge upon which to base their decisions, viz., (1) testimonial evidence, (2) circumstantial evidence, and (3) real evidence, the last of these three is the most natural and the most efficient of them all. As said by Chief Justice Robertson, in a case in which he had permitted the jury to inspect the defendant to determine if she was a white woman, "The counsel denies that a personal inspection by the jurors on the trial is proper or allowable evidence. . . To a rational man of perfect organization the best and highest proof of which any fact is susceptible is the evidence of his own senses. This is the ultimate test of truth, and is therefore the first principle in the philosophy of evidence. . . Hence, autopsy, or the evidence of one's own senses, furnishes the strongest probability and indeed the only perfect and indubitable certainty of the existence of any sensible fact."[71] Justice Rodman says, "On general principles it would seem that, when the question is whether a certain object is black or white, the best evidence of the color would be the exhibition of the object to the jury."[72] Some courts assert that what is usually called "real evidence" is not evidence at all. That it is analogous to admissions, in that it takes the place of evidence and saves the party who offers it the trouble of introducing evidence. But be this as it may, the fact remains that "the best and highest proof of which any fact is susceptible" is knowledge of the jurors acquired through their own senses. It follows, therefore, that, what is called real evidence, and for all practical purposes is real evidence, is entitled to the greatest weight.

70—Bishop on Marriage and Divorce, 6th ed., Vol. II., §§ 590, 591.

71—Gentry v. McGinnis, 3 Dana (Ky.), 382, 386.

72—Warlick v. White, 76 N. C., 175, 179.

CHAPTER II.

EVIDENCE OF EXPERIMENTS.

1. Definition.—The term "Experiment" is defined as "the operation of subjecting objects to certain conditions and observing the result, in order to test some principle or supposition, or to discover something new."[1]

§ 2. **The rule.**—Since the object of all evidence is to ascertain the truth as regards the fact or facts in issue, evidence of experiments is admissible, provided its tendency is to elucidate such fact or facts and thereby enlighten the minds of the jurors so as to enable them to act more intelligently in reaching a verdict.

§ 3. **Discretion of the court.**—The admissibility of experimental evidence is a preliminary question of fact for the court to determine. Each case, of course, depends upon its own circumstances. The trial court's ruling as to the admissibility of the evidence will not be interfered with by the court of review unless an abuse of its discretion is clearly apparent. It follows, therefore, that, in many cases, a ruling by the trial court either way will be sustained. If the object in making the experiment is not apparent to the court of review a presumption obtains that it was legitimate and proper. If the object in view is to establish or disprove merely an immaterial or irrelevant fact the evidence should be excluded.[2] If the object is to sustain a fact already established by other evidence a ruling either way by the trial court will not be considered erroneous.[3]

§ 4. **Experiments out of court by jurors.**—Information gained by jurors through making experiments out of court

1—Century Dictionary, "Experiment."

2—Libby v. Scherman, 146 Ill., 540.

3—Osborne v. Detroit, 32 Fed. Rep., 36; Stockwell v. Chicago, etc., Ry. Co., 43 Ia., 470.

should not be considered by them in determining their verdict, unless the experiments were made under the supervision of the court, and under substantially similar conditions to those which surrounded the transaction in question.[4]

§ 5. **Experiments out of court by witnesses.**—The admissibility of evidence of experiments made by witnesses out of court is a matter which rests largely in the sound discretion of the trial court. If the conditions surrounding the experiments were not substantially similar to those surrounding the transaction in question, the evidence, as a general rule, should be excluded. If, however, the evidence tends to enlighten rather than to confuse the jury it should, under proper restrictions, be admitted.[5] Evidence of experiments made out of court is usually given in connection with the testimony of experts;[6] but this is not essential to its admissibility.

§ 6. **Experiments which unduly delay the progress of the trial.**—As heretofore stated, the performance of experiments in the presence of the jury is a matter which rests in the sound discretion of the court. Where, however, the performance of an experiment will unduly delay the progress of the trial it should be prohibited. Thus, in a criminal case where the time it would take a candle to burn to a given length was a material fact in showing defendant's guilt, evidence of experiments to ascertain this was held admissible. But the ruling of the trial court, in refusing to suspend the trial in order that the defendant might try the experiment in the presence of the jury, was sustained.[7]

§ 7. **Evidence of experiments admissible to explain or support opinion evidence.**—It has been held that an expert who has given opinion evidence may not state in his examination in chief the details of experiments upon which his opinion is based; that evidence of such details must be restricted to his cross-examination.[8] The general rule, however, as well as the

4—Yates v. People, 38 Ill., 531; Harrington v. Worcester, etc., St. Ry. Co., 157 Mass., 579; State v. Sanders, 68 Mo. 202.

5—Alabama, etc., Ry. Co. v. Burgess, 114 Ala., 587; Burg v. Chicago, etc., Ry. Co., 90 Ia., 106.

6—Sullivan v. Com., 93 Pa. St., 285; Eidt v. Cutler, 127 Mass., 522.

7—People v. Levine, 85 Cal., 39.

8—Ingledew v. Northern Ry Co., 7 Gray (Mass.), 91.

better view, is to the contrary.[9] Evidence of the details of such experiments may establish conclusively the correctness of the opinion; but, if such evidence is to be restricted to the expert's cross-examination, it may often fail to reach the jury at all. As said by the court in one case, "If the reasons on which the intelligent opinion of an expert is founded can only be furnished to the jury by cross-examination, this case makes it evident that as wise a counselor as the plaintiff's would never give aid and comfort to his adversary by such a cross-examination."[10]

§ 8. **Evidence of experiments also admissible to explain or support non-expert evidence.**—Real opinion evidence may only be given by an expert. But, as heretofore stated (pp. 155, 156), "Spontaneous conclusions, as to conditions or appearances, drawn from perceptions resulting from a variety of circumstances which cannot be palpably described by the witness to the jury so as to enable that body to draw intelligent conclusions from them, are usually regarded, from the legal standpoint, as matter of fact and not of opinion."[11] "And, not only may such matter of fact be given in evidence by a non-expert witness, but also experiments upon which it is based. Thus, where the accused was charged with killing a horse by maliciously putting poison within its reach, evidence that the prosecuting witness and the owner of the horse, neither of whom was an expert, immediately upon the death of the horse, removed a portion of the contents of the horses's stomach and gave it to a hen which died in a few minutes from the effects, was held admissible. In this case the court say, "A nonexpert, shown to be familiar with evidentiary facts, may, when the expression of an opinion is not involved, ordinarily state the result of his observations with reference to such facts. An ordinary nonprofessional witness in possession of his faculties, who takes a section from the stomach of a horse and feeds it to a hen, which dies in ten minutes after eating the same, may

9—Hawkins v. Fall River, 119 Mass., 94.

10—Lewiston Steam Mill Co. v. Androscoggin Water Power Co., 78 Me., 274.

11—Conn., etc., Life Ins. Co. v. Lathrop, 111 U. S., 612.

testify to such facts, when material, for the same are as observable to him as to a professional witness."[12]

§ 9. **Evidence of experiments admissible to show that under certain conditions a certain result would, or would not, follow.**—Where it is material to prove that under certain conditions a certain result was produced, evidence of experiments is admissible to prove such fact. Thus, in a case in which the plaintiff sued for damages for causing the death of his intestate by reason of having his foot caught between the rails of a split switch of defendant's tracks, evidence of experiments, made by a person by placing his foot between the rails, together with evidence as to the manner in which his foot was held, was admitted.[13] And where it is alleged that a certain result is the necessary and natural consequence of certain conditions or circumstances for which a party is sought to be held liable, he may show by evidence of experiments, performed under similar conditions, that it is not. Thus, in an action against a railway company for damages sustained by reason of the death of a person caused by being struck by defendant's train, it is competent for the defendant to show by one of its engineers an experiment made subsequently to the accident, for the purpose of showing that the train which caused the death could not have been stopped after the person killed could have been seen on the track, provided the test was made at the same place, and under practically similar conditions. The fact that the experiment was *ex parte,* and such as could be made by only one of the parties, does not concern the question of admissibility of the evidence, but it may concern its weight.[14] But, where the circumstances and surroundings of an experiment are very different from those which existed at the time of the accident, evidence of the experiment is inadmissible. Thus, in a personal injury case against a railway company it was held prejudicial error for the trial court to admit in evidence the testimony of persons, who placed an inanimate object upon defendant's track, as to the distance at

12—State v. Isaacson, 8 S. Dak., 69.

13—Brooke v. Chicago, etc., Ry. Co., 81 Ia., 504.

14—Byers v. Railroad, 94 Tenn., 345.

which it could be seen and its character distinguished, where the circumstances and surroundings were very different from those which existed at the time of the accident.[15]

§ 10. **Admissibilty of evidence of experiments made with bloodhounds.**—As regards the admissibility of evidence of experiments made with bloodhounds, as to trailing an accused person, the decisions are not harmonious. Some courts reject such evidence on the ground of uncertainty. Thus, in a very recent case,[16] Chief Justice Sullivan says, "That the conclusions of the bloodhound are generally too unreliable to be accepted as evidence in either civil or criminal cases is, we believe, the teaching of that common knowledge and ordinary experience which we may rightfully bring to the examination of this subject. . . It is unsafe evidence, and both reason and instinct condemn it." On the other hand, in a very recent case,[17] Justice Cockrell says, "Testimony was admitted, over the defendant's objection, as to the action of two dogs in following the supposed trail of the burglar from the scene of the crime. . . The adjudged cases on this point are few, but uniform in admitting such evidence under proper conditions." In another recent case,[18] the court hold, in substance, "that evidence as to the trailing with a bloodhound of one accused of crime is admissible to connect him therewith only when it is shown by someone having personal knowledge of the fact that the dog is of pure breed, and of a stock characterized by acuteness of scent and power of discrimination; that he is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings; that such dog was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicate to have been made by him." Upon the whole, it may be said that testimony as to the action of bloodhounds in following the trail of a supposed criminal

15—C. & A. Ry. Co. v. Logue, 47 Ill. App., 292. See also Yates v. People, 32 N. Y., 511.

16—Brott v. State (Neb.), 97 N. W. R., 593.

17—Davis v. State (Fla.), 35 So. R. 76.

18—Pedigo v. Com., 103 Ky., 41, 82 Am. St. Rep., 566.

from a scene of a crime is generally held admissible, provided that such preliminary proof be given of the quality and training of the dogs as to show that reliance may reasonably be placed upon their accuracy in following the trail of a human being.[19] But evidence that bloodhounds of the same breed and trained by the same man as those used to track the accused in a criminal case, after being put upon the track of a human being left the trail to follow the trail of a sheep, is inadmissible. As said by Justice McClellan, "The court properly excluded from the jury the proposed evidence as to two bloodhounds of the same breed as those employed to track the supposed criminal in this case, and trained by the same man, being put upon the trail of a human being, and leaving it to trail a sheep which they overhauled and killed. The test by comparison was not sufficiently certain to determine the reliabilty of the dogs employed here by reference to the qualities of the other dogs."[20]

19—Davis v. State (Fla.), 35 So. R., 76.

20—Simpson v. State (Ala.), 20 So. R., 572.

PART IV.

WRITINGS.

CHAPTER I.

PROOF OF AUTHORSHIP.

§ 1. **Dual character of writings.**—Writings possess a dual character. They may be considered as mere physical objects, or as expressions of ideas. In the former sense they constitute real evidence, like weapons, burglars' tools, bloody or torn clothing, etc. In this sense, however, they have no evidentiary force except as mere pieces of paper. A material fact in issue may be the mere *existence* of a certain writing, in which case its introduction in evidence would, of course, constitute proof of that fact. In the law of evidence, however, writings are used almost exclusively in the sense of expressions of ideas, and in this sense many interesting and important questions arise with respect to their use.

§ 2. **Classification of written evidence.**—Written evidence is divided into the following three general classes: (1) Private writings; (2) Public writings; and (3) Quasi-public writings.

Private writings are subdivided into the following classes: (1) Attested writings; and (2) Unattested writings. The modes of proof of authorship of these two subdivisions are governed by different rules.

Public writings, with respect to their character, are subdivided into the following two classes: (1) Judicial; and (2) Non-judicial. With respect to their mode of proof, they are subdivided into the following two classes: (1) Of record; and (2) Not of record.

Judicial writings are subdivided into the following three classes: (1) Judgments, decrees and verdicts; (2) Depositions, examinations and inquisitions; and (3) Warrants, writs, pleadings, etc.

§ 3. **Definitions—Attestation—Authentication — Exemplification.**—The term "attest" means to affirm to be true or genuine. The term "attestation" means the act of witnessing a document at the request of the maker, and subscribing it as a witness. Some writers apply these terms to authenticated copies of judicial records; while others say they are used in connection with the execution of instruments, and are to be distinguished from authentication and exemplification of records and documents. The term "authentication" is defined by Bouvier as "a proper or legal attestation." The term "exemplification," which applies strictly to matters of record, is defined by the same author as "a perfect copy of a record or office-book lawfully kept, so far as it relates to the matter in question." It has also been defined as "an official transcript of a document from public records made in form to be used as evidence, and authenticated as a true copy." An exemplification is always under either the seal of the state or the seal of the particular court.

§ 4. **Attested writings—The common law rule.**—At the common law, the rule is strict that in proving the execution of an attested document it is essential, before using other evidence, to call at least one of the subscribing witnesses, if available; and if not available to prove the handwriting of at least one of them, if feasible. The rule is applicable to all kinds of documents, sealed or unsealed; and the fact that attesting witnesses are not essential to the validity of certain documents is immaterial. Some courts, however, seem to limit the application of the rule to documents required by law to be attested. Thus, Chief Justice Shaw says, "It being an instrument not requiring attestation to give it legal effect as an instrument, it would be sufficient to prove the fact of execution by any competent evidence."[1] The rule is also applicable to documents which have been burnt or cancelled; and the fact that the subscribing witnesses are blind is immaterial. Nor is the mere fact of inconvenience a sufficient reason for dispensing with the rule. As said by Lord Chief Justice Ellenborough, "The rule is universal that you must first call the subscribing witness; and it is not to be varied in each particular case by try-

1—Amherst Bank v. Root, 2 Metc. (Mass.) 522, 533.

ing whether in its application it may not be productive of some inconvenience."[2]

§ 5. **Origin of the rule.**—The rule that attesting witnesses must be called, if available, is of very ancient origin. It existed as far back as the old Germanic procedure. Professor Thayer says, "Such persons (attesting witnesses) belonged to that very ancient class of transaction or business witnesses, running far back into the old Germanic law, who were once the only sort of witnesses that could be compelled to come before the court."[3]

§ 6. **Reasons for the rule.**—Two reasons have been given for the existence of this rule, neither of which, however, is satisfactory. The one most favored is, that the parties to the document had agreed that proof of its execution should be made by the attesting witness. As said by Chief Baron Pollock, "The attesting witness must be called to prove the execution of a deed for this reason, that by an imperative rule of law the parties are supposed to have agreed *inter se* that the deed shall not be given in evidence without his being called to depose to the circumstances attending its execution."[4] And as said by Justice Cresswell, "It is not on the ground that his is the best evidence . . . but because he is the witness agreed upon between the parties."[5] This reason, however, is weak, and it has been very severely criticised. Thus, Justice Spencer says, "The notion that the persons who attest an instrument are agreed upon to be the only witnesses to prove it, is not comportable to the truth of transactions of this kind, and, to speak with all possible delicacy, is an absurdity."[6] And Justice Burket says, "This supposed mutual agreement is a pure fiction, and rarely, if ever, exists in fact. If in any case, it has a real existence, and can be shown, it may perhaps be enforced; but the mere fiction is entitled to no weight and to no respect."[7] The other reason assigned for the rule is, that the adverse party is entitled to the benefit of cross-examining

2—R. V. Harringworth, 4 M. & S. 350.

3—Thayer's Prelim. Treatise on Evid., 502.

4—Whyman v. Garth, 8 Exch. 803.

5—Gerapulo v. Wieler, 10 C. B. 690, 696.

6—Hall v. Phelps, 2 John. (N. Y.) 451.

7—Garrett v. Hanshue, 53 Ohio St., 482.

the attesting witness. As said by Lord Chief Justice Alvanley. "The rule was founded on the principle that there should be an investigation from the subscribing witness of what took place at the time of the execution of the instrument."[8] And as said by Justice Le Blanc, "A fact may be known to the subscribing witness not within the knowledge or recollection of the obligee, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction."[9] This reason, however, is also weak, and it, too, has been frequently criticised, the chief criticism being that, in practice, the attesting witness in the majority of instances knows nothing of the transaction.

§ 7. **Statutory restrictions of the rule.**—In England, and in many of the states of this country, statutes have been passed which materially modify the common law rule. The English statute, which was passed in 1854, restricts the rule to documents required by law to be attested.[10] In this country similar legislation exists in many of the states, including Illinois, Michigan, New York, Pennsylvania, Alabama, Rhode Island and Massachusetts. The Massachusetts statute reads as follows: "It shall be competent to prove the signature to any attested instrument or writing, except a will, in the same manner as if such instrument were not attested."[11]

§ 8. **Meaning of the term "Attesting Witness."**—An attesting witness is a person who, by request of the maker of the instrument, or with his consent, signs it for the purpose of manifesting knowledge on his part that it has been executed by the alleged maker. The mere fact that a person's name is on the instrument, other than the maker, does not make him an attesting witness. Thus, when the signature of an officer is essential to the validity of an instrument the officer is not an attesting witness.[12] And a person who saw the instrument executed, and signed it at a subsequent time, is not an attesting

8—Manners v. Postan, 4 Esp. 241.

9—Call v. Dunning, 4 East 54.

10—17 and 18 Vict. chap. 125, §26. This act provides as follows: "It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission, or otherwise, as if there had been no attesting witness thereto."

11—Statutes of 1897, chap. 387.

witness.[13] Nor is an incompetent person,[14] or a fictitious person,[15] whose name is signed to the instrument, an attesting witness.

§ 9. **Extrajudicial admissions by the adverse party.**—Upon principle, a written extrajudicial admission by the adverse party, acknowledging the execution of a document, should be sufficient to dispense with the rule which requires that an attesting witness be called. On the other hand, a disputed oral admission should not have this effect. The decisions upon this question, however, are not harmonious. In England, both classes of admissions have been held sufficient to dispense with the rule.[16] In this country, according to the general rule, neither class is sufficient for that purpose;[17] but some decisions hold the contrary.[18]

§ 10. **Effect when the attesting witness denies the execution of the document.**—It does not follow that because the attesting witness must be called, the person who calls him is concluded by his testimony. Hence, if the attesting witness denies the execution of the document, or fails to recollect anything about it, the person who calls him is then at liberty to prove the execution by any other competent testimony. As said by Justice Denio, "Whether their (the witnesses') denial of what they had attested proceeds from perversity or want of recollection, the testament may in either case be supported."[19]

§ 11. **The rule when the attested document is acknowledged under a statute.**—"Whenever a statute authorizes the acknowledging of an instrument, providing at the same time that such instrument shall be admissible in evidence on proof of its acknowledgment, then if the conditions required by the statute as prerequisites of the acknowledging appear from the record to have been observed, it is not necessary to call the attesting

12—Bailey v. Bidwell, 13 M. & W. 73; Lavretta v. Holcomb, 98 Ala. 503, 510.

13—Henry v. Bishop, 2 Wend. (N. Y.) 575, 577.

14—Packard v. Dunsmore, 11 Cush. 283, 285.

15—Burrows v. Lock, 10 Ves. Jr. 470, 474.

16—Dillon v. Crawley, 12 Mod. 500.

17—Jones v. Henry, 84 N. C. 320.

18—Hall v. Phelps, 2 John, (N. Y.) 451.

19—Tarrant v. Ware, 25 N. Y. 425, 426.

witnesses, but such instrument may be put in evidence after the acknowledgment required by the statutes, either by force of the statutes or at common law, by proving the execution."[20]

§ 12. **Excuses for not calling attesting witnesses.**—The chief causes of unavailability of attesting witnesses are the following: (1) Death; (2) Insanity; (3) Absence from the state; (4) Whereabouts unknown; (5) Physical incapacity or illness; (6) Attesting witnesses unknown.

The death of an attesting witness is universally recognized as a sufficient excuse for not calling him.[21] So is insanity.[22] Absence from the state,[23] whereabouts unknown,[24] physical incapacity or illness,[25] and the fact that the attesting witness is unknown,[26] are usually held sufficient excuses for not calling him. The fact that the attesting witness is unknown may arise where the document is lost, or the name of the attesting witness is illegible. In the case of a lost instrument, if the name of the attesting witness is known, and he is available, he must be called.[27] As a general rule, blindness will not excuse calling the witness. The reasons assigned for this rule are, "the circumstances attending the execution might be proved by him";[28] and, "He might from his recollection give most important evidence respecting it."[29] Some cases, however, hold

20—Stephen's Digest of Evid., Art. 69.

21—Stebbins v. Duncan, 108 U. S. 32.

22—Neely v. Neely, 17 Pa. St. 227; Currie v. Child, 3 Camp. 283.

23—Valentine v. Piper, 22 Pick. (Mass.) 85, 90; Jones v. Roberts, 65 Me. 273.

24—Hartford Life Ins. Co. v. Gray, 80 Ill. 28; Crosby v. Percy. 1 Taunt. 364, 366. In the latter case Chief Justice Mansfield says: "The law has been much relaxed in this particular within the period of my practice; the increased commerce of the country, and the number of persons who every year go out of it, first rendered it necessary to admit secondary evidence in the case of witnesses being abroad; the dispensation was next extended to the case of witnesses who were not to be found.

25—Jackson v. Root, 18 John. (N. Y.) 60, 80.

26—Felton v. Pitman, 14 Ga. 530, 535; Raynor v. Norton, 31 Mich. 210, 213; Hathaway v. Spooner, 9 Pick. (Mass.) 23, 25.

27—Smith v. Brannan, 13 Cal. 107, 115.

28—Baron Parke in Pedler v. Paige, 1 Mos. & Rob. 258.

29—Lord Chief Baron Abinger in Crank v. Frith, 1 Mos. & Rob 262.

that such an infirmity is a sufficient excuse for not calling him.[30]

§ 13. **The rule when the attesting witness is unavailable.**— When the attesting witness is unavailable, the rule at common law is, that before the maker can testify to his signature the handwriting of the attesting witness must be proved, if feasible to do so. The two reasons assigned for this rule are the following: (1) The greater risk a person incurs in forging the signatures of both witnesses and party than of the party alone; and (2) The witnesses who subscribe at the time of the execution are agreed upon by the parties to be the only witnesses to prove it. The rule itself, and the two reasons assigned for it, are all unsatisfactory; and all of them have frequently been the subjects of adverse criticism. In this country the rule has often been considered as possessing only a technical and traditional significance. Justice Lumpkin, in commenting upon it, and refusing to be governed by it, says, "A technical and artificial rule had prevailed over our right reason."[31] And Justice Trumbull says, "Why proof of the handwriting of a subscribing witness should be better evidence of the execution of an instrument than that of the obligor is not very apparent, and the attempts to give a reason have not in my judgment been very satisfactory."[32] He also adds, "As a general rule, therefore, whenever the subscribing witnesses to an instrument are beyond the jurisdiction of the court, its execution may be proved by proof of the handwriting of the grantor or obligor. This rule does not, of course, apply to instruments which the law requires to be attested by witnesses. In such cases evidence of the handwriting of both party and witness would be requisite." In this country many courts follow this rule.

If proof of the handwriting of the attesting witness is unobtainable, the signature of the maker may be proved without it, except where attestation is required by law. In the latter case the attestation is an element in the validity of the instrument, and must be proved or the party upon whom the burden

30—Wood v. Deury, 1 Lord Raymond 734; Baker v. Blount, 2 Hayw. 404.

31—Watt v. Kilburn, 6 Ga. 356, 358.

32—Newsom v. Luster, 13 Ill. 175.

of proof rests fails.[33] Instances where proof of the signature of the attesting witness may be dispensed with because such proof is not obtainable are the following: (1) Where the attesting witness subscribes by mark; (2) Where the instrument is lost, or the signature is illegible; (3) Where after diligent search, testimony to the identity of the handwriting cannot be produced. The last of these instances is the most common one. The first has been recognized by only a few courts.

Some courts hold that when both parties to the instrument are in court and waive the right to insist on calling the attesting witness, the execution of the instrument may be proved by the party sought to be charged without calling the attesting witness or proving his signature.[34] This rule is sensible and should be followed by all courts. The reason for the rule which requires the subscribing witness to be called to prove the execution of a written contract is to protect the interest of the party sought to be charged; and this party is a competent witness to prove its execution without producing the attesting witness. To deny the parties to such contract the right to admit its execution is entirely captious.[35] In this country at the present time this view obtains generally.

§ 14. **Ancient documents.**—The subject of ancient documents is discussed in Chapter XII., of Part II., of this volume. As stated in § 3 of that chapter, an ancient document (one at least thirty years old) is admissible in evidence to prove its contents without proving its authenticity or execution by calling the attesting witnesses, if any, or by proving their handwriting or otherwise.

§ 15. **The common law rule not applicable in this country to collateral writings.**—In this country it is generally held that the rule which requires attesting witnesses to be called is not applicable to writings which are incidentally or collaterally in issue. As stated by Justice Gilchrist, "when the existence of the writing is of no consequence or significance but as a part of the *res gestae* which a stranger seeks to prove and to characterize with reference to his own rights, then the reason of the

33—Cram v. Ingalls, 18 N. H. 613, 616.

34—Forsythe v. Hardin, 62 Ill. 206.

35—Case cited in note 34.

rule entirely fails and the rule itself has no application."[36] The reason assigned for the limitation is, that to require a party in such a case to call the subscribing witnesses would be taking him by surprise. As stated by Justice Brackenridge, "I would then restrain the rule to a case where the execution of a writing is directly in issue, unless notice shall have been given that it was material to have this proof. . . . Coming in collaterally, it would be taking a party by surprise to render it necessary to produce the subscribing witness."[37]

In England, however, this limitation to the common law rule has never been recognized.

§ 16. **Authentication of a judgment, or other judicial record.**—There are two general ways of proving a judgment: (1) By producing the judgment itself; and (2) By producing a copy of it. The former method is applicable when the action in which it is sought to be introduced is before the same court which rendered it. Copies of a judicial record are divided into the following three classes: (1) Exemplifications; (2) Copies made by authorized officers; and (3) Sworn copies. Exemplifications are subdivided into the following two classes: (1) Those under the great seal; and (2) Those under the seal of the particular court.

§ 17. **Same—Provision of United States Constitution—Act of Congress.**—Article IV., Section 1, of the Constitution of the United States, provides that, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." In pursuance of this provision, Congress, in 1790, enacted that, "The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings so

36—Rand v. Dodge, 17 N. H. 343, 357.

37—Heckert v. Haine, 6 Binn. 16, 20.

authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."[38]

§ 18. **Effect of the act of Congress.**—This act of Congress is applicable to the judicial records and proceedings of both courts of law and courts of chancery.[39] It is not, however, exclusive.[40] The several states may enact laws which provide for a different and less strict mode of authenticating judicial records; but such laws must not impose any additional requirements to those provided by the act of Congress.[41] The act does not exclude any competent proof known to the common law.[42]

As a general rule, it is not applicable to the records of a justice of the peace. As said by Chief Justice Parker, "Certainly, we think, the judicial proceedings referred to in the constitution were supposed by the Congress, which passed the act providing the manner of authenticating records, to have related to the proceedings of courts of general jurisdiction, and not those which are merely of municipal authority."[43] In some states, however, including Connecticut and Vermont, justices of the peace are required by law to keep records of their proceedings; and where this rule obtains such records are held to be within the meaning of the act.

According to the great weight of authority the act is not applicable to the records and proceedings of the various federal courts.[44] The contrary, however, has been held.[45] The test is, whether the relation existing between the various federal courts is domestic or foreign. The view which obtains generally is, that it is domestic; and for this reason it is generally

38—U. S. Rev. Stat. §905; Destz Fed. Proc. §425.

39—Patrick v. Gibbs, 17 Tex. 275.

40—People v. Miller, 195 Ill. 621.

41—Garden City, etc. Co. v. Miller, 157 Ill. 225.

42—Otto v. Trump, 115 Pa. St. 425.

43—Warren v. Flagg, 19 Mass. 448, 449.

44—Kingman v. Cowles, 103 Mass. 283; McGregor v. Hampton, 70 Mo. App. 98; Morgan v. New York Nat'l. etc., Assoc., 73 Conn. 652; O'Hara v. Mobile, etc., Ry. Co. 40 U. S. C. C. of App. 471.

45—Adams v. Lisher, 3 Blacks. (Ind.) 241.

held that the act has no application to the records of the federal courts.

Nor is the act applicable to the records of state courts where such records are sought to be proved in other state courts within the same territorial jurisdiction. The reason for this rule is the same as that assigned for the rule applicable to the records of the federal courts, viz.: the relation existing among these courts is domestic and not foreign.

§ 19. Mode of attestation under act of Congress.—The mode of attestation of judicial records, provided by the act of Congress, embodies the following steps: (1) The making of a certificate of the record by the clerk of the court; (2) Annexing to this certificate the seal of the court; (3) The making of a certificate by the judge, to the effect that the certificate of the record is executed in due form, and annexing the judge's certificate to that of the clerk. The clerk's authority is derived wholly from the act of Congress, and not at all from any state law. The test of the sufficiency of the judge's certificate is the law of the state from which the record is taken. If the court comprise more than one judge the certificate must be made by the presiding judge, and this fact must appear in the certificate. It is not essential, however, that the judge's identity or official capacity be certified to. Nor is it essential, in the case of documents presumed by the law to be matters of record, that the judge certify to the identity of the clerk, or the seal of the court. His function is to certify that the *attestation is in due form.* His certificate must show this fact; also that when the certificate was executed he was judge, chief justice, or presiding magistrate of the court; and that the county from which the records are certified is within his jurisdiction. Some courts hold that it should show the official character of the clerk of the court and his ability to act.[46] It has also been held that the clerk attesting must be the officer himself and not an under-clerk.[47] The seal of the court must be annexed to the certificate of the clerk, and not to the certificate of the judge. It is the certificate of the judge, however, which gives

46—English v. Smith, 26 Ind. 445; Gavit v. Snowhill, 26 N. J. L. 76.

validity to the transcript of the record and establishes the validity of the form adopted by the clerk.

§ 20. **Mode of attestation in some states.**—In some states the mode of attestation provided by statute does not require certification by the judge. The attestation of the clerk, with the seal of the court annexed, is sufficient.[47] And in some states, the certificate of the judge, whether or not he is the chief justice of presiding magistrate, is sufficient.[48]

§ 21. **Mode of attestation at common law—Foreign judgments.**—At the common law the following three modes of attestation of foreign judgments obtain: (1) By exemplification; (2) By the certificate of an officer authorized by law; and (3) By a sworn copy. Any one of these modes is allowable, notwithstanding the act of Congress.[49]

By the first of these three methods the transcript of the record is authenticated by the seal of the particular court.

Where the law intrusts a particular officer with the making of copies of judicial records, and such copies are certified to by the officer, they are admissible in evidence without further proof. In nearly all the states statutes provide for the making of records by authorized officers.

A record may always be shown by a sworn copy. It is essential, however, to show that the original, at the time the copy was made, was taken from the proper custody. This fact is not presumed, nor can it be shown by the transcript of the record. It must always be shown by extrinsic evidence. By this mode a judicial record may be shown by any competent witness.

§ 22. **Mode of proving federal court records.**—As stated in § 17 of this chapter, by the great weight of authority the act of Congress is not applicable to the records and proceedings of the various federal courts, owing to the fact that the relation existing among these courts is domestic and not foreign. It follows, therefore, that the mode of proving in one federal court the judicial records and proceedings of another, is the mode which is applicable to the records of domestic courts.

47—Frost v. Holland, 75 Me. 108.
48—Simons v. Crook, 29 Ia. 324.
49—Capling v. Herman, 17 Mich. 524; Karr v. Jackson 28 Mo. 316; Title Guarantee, etc., Co. v. Trenton, 56 N. J. Eq. 441.

This mode comprises a transcript of the record duly certified to by the clerk of the particular court, and the seal of the court annexed to the clerk's certificate.

§ 23. **Mode of proving state court records.**—The act of Congress, as heretofore stated, is not applicable to the records of state courts where it is sought to prove them in other state courts within the same territorial jurisdiction. In such a case the mode of proof is less complicated than that provided by the act of Congress. All that is required is the certificate of the clerk of the court, with the seal of the court annexed thereto, setting forth the fact that it is a full, true and complete copy of the record which is in his custody by authority of law. A record exemplified under the seal of the court is said to prove itself.[50] The reason is, that any court is presumed to know and recognize the seal of any other court within the state.

§ 24. **Mode of proving the records of justice of the peace courts.**—As a general rule, the act of Congress, as heretofore stated, is not applicable to justice of the peace records, for the reason that such courts are usually courts not of record. But, in the few states in which justices of the peace are required by law to keep records, including Connecticut and Vermont, the act of Congress is applicable, and the fact that the justice of the peace had no clerk and kept the records himself, and had no seal, does not render the act of Congress inapplicable. As said in one case, "In those states where justices of the peace hold courts of record, where they are the sole judges and have no other persons to be their clerks, they are the presiding magistrates and clerks of their own courts, and may certify their records in a manner conformable to the act of Congress. After attestation of the record, a justice of the peace may certify that he is the presiding magistrate and clerk of the court, that there is no seal, and that the attestation is in due form, and then subscribe it as justice of the peace. This would be a literal compliance with the act, and the copy of the record so certified would be admissible in evidence."[51] In some states, however, including Illinois, it has been held that the records of justices of the peace of one state cannot be authenticated

50—Names v. Names, 48 Neb. 710; Adams v. Way, 33 Conn. 419. 51—Bissell v. Edwards, 5 Day, 363.

under the act of Congress in another state.[52] The rule obtains generally that the judicial proceedings of a justice of the peace of a foreign state are admissible in evidence in another state when such proceedings are exemplified under the seal of the state, or attested by the certificate of an officer authorized by law, or by a sworn copy by any competent witness. In many of the states special statutes provide for the admissibility of certified copies of such records by authorized officers. In a few states, however, including Illinois, no such statutes exist. The proceedings of a justice of the peace court may be proved by producing the book containing such proceedings; and, where no such book is kept, by showing the certificate of the justice of the peace authenticating them.

§ 25. **Mode of proving quasi-judicial records.**—Quasi-judicial records "are the results of inquiries made under public authority concerning matters of public or general interest, though the affairs to which they relate are private. They are generally the conclusions of juries, coroners, commissioners or other officers under oath, and often, though not necessarily, based on evidence taken under oath." They include verdicts of coroners' juries, and findings of commissioners relating to insanity inquests. They may be proved by producing the original records, or by a properly certified copy.

§ 26. **Mode of proving unattested writings.**—The authorship of unattested documents may be established by the testimony of the writers themselves, or by that of others who saw the documents executed, or by proof of the handwriting. The last of these three modes is less satisfactory than either of the other two. The handwriting may be proved either by the testimony of witnesses who are familiar with it, or by comparison. As stated by Taylor, "When writings are produced, and it becomes necessary to show by whom they were written or signed, the simplest mode of proof is to call the writer himself, or some person who actually saw the paper or signature written. When evidence such as this cannot be procured, as must often be the case, recourse may be had, either to the testimony of witnesses, who are acquainted with the handwriting, or to a

52—Trader v. McKee, 2 Ill. 558; Buntain v. Baily, 27 Ill. 409.

comparison of the document in dispute with any writing proved to the satisfaction of the judge to be genuine. These last modes of proof, indeed, may in all cases be given in the first instance, since the law recognizes no distinction between them and the ocular proof just mentioned; but as they are obviously of a less satisfactory character than direct testimony, any unnecessary reliance on them is calculated to raise suspicion that the party is actuated by some improper motive in withholding evidence of a more exclusive nature."[53]

§ 27. **Public records—Their mode of proof.**—Official public records, or duly certified copies thereof, are admissible in evidence when material to the issue. It is often said that a record proves itself. It does not follow, however, that proof of its authenticity is not essential. It is a fundamental rule that a document to be admissible must be shown by extrinsic evidence to be what it purports to be. It is not essential to the admissibility of a public record that a statute require it to be kept. It is sufficient that it be kept in the discharge of a public duty.[54] Nor is it essential that it be kept by the public officer himself. It is sufficient if it be kept under his direction.[55] As a general rule, public records are not conclusive as to their contents, but they are sufficient to establish their *prima facie* facts.[56] As regards public statutes, however, some courts hold that their recitals are conclusive;[58] while others hold the contrary. All courts, however, hold that such recitals are at least presumed to be true until the contrary be shown.[59]

§ 28. **Same—State statutes—Act of Congress.**—State courts are bound to take judicial notice of the recitals of their public

53—2 Taylor on Evid. (9th ed.) sec. 1862.

54—Taylor on Evid. §1429; 1 Greenleaf on Evid. §483.

55—Galt v. Galloway, 4 Pet. (U. S.) 332; Gurney v. House, 9 Gray (Mass.) 404; Evanston v. Gunn, 99 U. S. 660.

56—Sandy White v. United States, 164 U. S. 104; Evanston v. Gunn, 99 U. S. 660.

57—Lane v. Harris, 16 Ga. 217; Brodnax v. Groom, 64 N. C. 244.

58—Kinkead v. United States, 150. U. S. 483; Priewe v. Wisconsin State Land Co., 103 Wis. 537; Mersey Docks v. Cameron, 11 H. of L. Cas. 519.

59—Thornton v. Lane, 11 Ga. 521.

statutes. It is not essential, therefore, to plead or prove such recitals. Private statutes, however, must be pleaded and proved. The latter may be proved by an authorized edition of the state statutes, or by a copy under the seal of the state. As a general rule, a printed statute book is not conclusive; but it is sufficient when duly authorized to establish *prima facie* its contents. Stronger proof is to be found in the journals or enrolled laws;[60] and the latter of these control the former.[61]

In pursuance of an act of Congress, state statutes may be proved by copies thereof attested by the seal of the state; and such copies are conclusive in the courts of any state of the Union. Under this act the only formality essential is the seal. It, in itself, is sufficient to raise the presumption that the party who annexed it had authority so to do, and that he had custody of the original.[62] This mode of proof, however, is not exclusive.[63] The laws of another state, including the common law, may be proved by expert witnesses, or by an authorized edition of such laws.[64]

§ 29. **Same—Executive documents—State papers.**—It is a fundamental rule of evidence, applicable to all public documents, that where the originals are admissible, properly authenticated copies are also admissible. Based upon this rule, executive documents, authenticated by the signature of the secretary, and under the seal of the department, are admissible. And the volumes known as the American State Papers, published by authority of the Senate under the revision of the Secretary of the Senate, are admissible without further proof. As said by Justice Catron, of the Supreme Court of the United States, "These State Papers were published by order of Congress, and selected and edited by the Secretary of the Senate and Clerk of the House. They contain copies of legislative and

60—Spangler v. Jacoby, 14 Ill. 297; Happel v. Brethauer, 70 Ill. 166.

61—Simpson v. Union Stock Yards Co., 110 Fed. Rep. 799; Ritchie v. Richards, 14 Utah 345, 47 Pac. Rep. 678, and numerous authorities there cited.

62—Spangler v. Jacoby, 14 Ill. 297; Happel v. Brethauer, 70 Ill. 166.

63—Title Guarantee, etc., Co. v. Trenton Pot Co., 56 N. J. Eq. 441.

64—Greason v. Davis, 9 Ia. 219; Young v. Bank of Alexandria, 4 Cranch (U. S.) 388.

executive documents, and are as valid evidence as the originals are from which they are copied."[65] And as said by Justice Gray, "Acts of Congress, and proclamations issued by the Secretary of State in accordance therewith, are the appropriate evidence of the action of the national government (Taylor on Evid., 5th ed., § 1473; 1 Greenl. on Evid. § 491). And the volume of public documents, printed by authority of the Senate of the United States, containing letters to and from various officers of the state, communicated by the President of the United States to the Senate, was as competent evidence as the original documents themselves."[66]

§ 30. **Same—Municipal records.**—The recitals in municipal records may be proved by the original records, or by a duly certified copy.[67] Thus, an ordinance may be proved by a certified copy thereof, and such a copy is *prima facie* evidence that all essential steps were taken to render it valid.[68] And, as a general rule, an ordinance may be proved by introducing a printed book of the ordinances published by proper authority.[69]

§ 31. **Same—Post office records.**—Records kept by a postmaster, in pursuance of authority vested in him by the Post Office Department, are admissible in evidence.[70]

§ 32. **Same—School records—Prison records.**—School commissioners' records are admissible, when duly authenticated, to prove their official acts.[71] And entries made by the warden of a penitentiary, or by a jailor, in the performance of his official duty, are also admissible, when duly authenticated.[72]

§ 33. **Same—Tax records.**—The books of county treasurers, assessors and collectors, are official documents, and as such ad-

65—Bryan v. Forsythe, 60 U. S. 334, 338.

66—Whiton v. Albany and Nar. Ins. Co's., 109 Mass. 24, 30.

67—Lindsay v. City of Chicago, 115 Ill. 120.

68—McChesney v. City of Chicago, 159 Il. 223.

69—Campbell v. St. Louis. etc., Ry. Co., 175 Mo. 161; People v. Murray, 57 Mich. 396.

70—Miller v. Boykin, 70 Ala. 469; Merriam v. Mitchell, 13 Me. 439.

71—Monaghan v. School Dist., 38 Wis. 101; Hendrick v. Hughes, 15 Wall. (U. S.) 123.

72—Sandy White v. United States, 164 U. S. 100.

missible in evidence to prove their contents. They are not conclusive, but sufficient to establish a *prima facie* case.[73]

§ 34. **Same—Weather reports.**—Weather reports, kept by a person in discharge of a public duty, are admissible in evidence. It is not essential that a statute require them to be kept, nor need they be kept by a public officer himself. It is sufficient if the entries are made under his direction by a person authorized by him.[74]

73—Gage v. Davis, 122 Ill. 520; Anthony v. Mercantile, etc., Assoc., 162 Mass 60.

74—Evanston v. Gunn, 99 U. S. 660; De Armond v. Neasmith, 32 Mich. 231; Huston v. Council Bluffs, 101 Ia. 33; Moore v. Gans, etc., Co., 113 Mo. 98.

CHAPTER II.

ALTERATION OF WRITINGS.

§ 1. Definitions and classifications.—The term "alteration" has both a technical and a colloquial meaning. It is usually defined as an act done upon an instrument by which its meaning or language is changed. In its technical sense, as used in the law of evidence, the act must be done without the consent of the other party to the instrument. In its colloquial sense, the act is done by agreement of the parties, and the effect is to create a new agreement which supersedes the original one. When the act is done by a third party without authority it is called spoliation. The alteration or spoliation may consist of an interlineation, an erasure, a cancellation or an addition. Alterations are either material or immaterial. A material alteration is one which changes the legal effect of the instrument.[1] An immaterial alteration is one which does not.[2] An alteration which does not affect in any manner the rights or interests, duties or obligations, of either of the parties to the instrument, is immaterial.[3]

§ 2. Effect of alterations. Early rule. Modern rule.—In determining the effect of an alteration in an instrument, it is essential to take into account the following considerations: (1) The materiality of the alteration; (2) By whose authority it was made; (3) The intention with which it was made; and (4) The time, relatively speaking, when it was made.

According to the early English rule, even an *immaterial* alteration, *if made by the obligee,* invalidated the instrument. As said in an early and leading case upon the subject, "if the obligee himself alters the deed in any of said ways, although not material, yet the deed is void."[4] And according to this rule a material alteration *though made by a stranger* had the

1—Wheelock v. Freeman, 13 Pick. (Mass.), 168.

2—Smith v. Crooker, 5 Mass., 538.

3—Arnold v. Jones, 2 R. I., 345.

4—Pigot's Case, 11 Coke, 26.

same effect. This early rule, however, has been wholly and unanimously repudiated in this country, and considerably relaxed in England. Justice Story in condemning it says, "a doctrine so repugnant to common sense and justice, which inflicts on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven, ought to have the unequivocal support of unbroken authority before a court of law is bound to surrender its judgment to what deserves no better name than a technical quibble."[5] Lord Coke went so far as to say that the deed was invalidated even where the alteration was made before the deed was executed;[6] but this view probably was never sustained by any court.

According to the modern rule, an alteration, to invalidate the instrument, must possess the following requisites: (1) It must be material; (2) It must be made intentionally; (3) It must be made by the grantee or promisee; (4) It must be made without the consent of the grantor or promisor; and (5) It must be made after the execution of the instrument.[7] The fact that the alteration is favorable to the grantor or promisor is immaterial.[8] Moreover, to avoid the instrument a fraudulent intent in making the alteration is not essential.[9] The reason that an alteration by the grantor or promisor does not avoid the instrument is, a person is not allowed to take advantage of his own wrong.[10] It has been held, however, that a material alteration of a deed by the grantor after execution and delivery avoids the covenants contained therein in his favor.[11]

§ 3. **Reasons for the rule.**—The two reasons which are usually assigned for the existence of the rule are the follow-

5—United States v. Spalding, 2 Mason (U. S.), 478.

6—Coke upon Littleton, 225 b.

7—Aldous v. Cornwell, L. R. 3 Q. B. D., 573; Hord v. Taubman, 79 Mo., 101; Greenfield Savings Bank v. Stowell, 123 Mass., 206; Osborne v. Van Houten, 45 Mich., 444.

8—Montgomery v. Crossthwait, 90 Ala., 553; Hewins v. Cargill, 67 Me., 554.

9—Booth v. Powers, 56 N. Y., 22; Harsh v. Klepper, 28 Ohio St., 204.

10—Martin v. Tradesmen's Ins. Co., 101 N. Y., 498.

11—Wallace v. Harmstad, 44 Pa. St., 492.

ing: (1) A material alteration of an instrument destroys its identity, and therefore no recovery can be had upon it; and (2) To countenance tampering with written instruments is against public policy.[12] As said by Justice Swayne, "To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument as to the party sought to be wronged."[13] And as said by Justice White, "The policy of the rule is to preserve the integrity of legal instruments by taking away the temptation of tampering with them."[14]

§ 4. **Application of the rule.**— Originally, the rule was applied to sealed instruments only; but later it was extended and made to apply to written instruments generally. Thus it has been held to apply to bills of lading;[15] powers of attorney;[16] recognizances;[17] contracts of guaranty;[18] charter parties;[19] leases;[20] insurance policies;[21] promissory notes;[22]

12—Lee v. Butler, 167 Mass., 426; Mersman v. Werges, 112 U. S., 139.

13—Wood v. Steele, 6 Wall. (U. S.), 80.

14—Wallace and Park v. Jewell, 21 Ohio St., 163. See also Kingan v. Silvers, 13 Ind. App., 80, 37 N. E. R., 413. In the latter case the court say: "A written instrument in the hands of an adverse party is easily susceptible of alteration to the injury of the maker. Many written contracts are negotiable and perform important functions in commercial transactions. It is of the highest importance to the commercial world that they be preserved in their original state or condition. Public policy demands this for the prevention of frauds, and of loss to innocent persons. The most effectual means of preserving the integrity of such instruments is the rule that a material alteration destroys the instrument. So that no recovery can be had upon it, either in its original or its altered condition. . . . The object of the rule is to enjoin the highest care upon the holder, and to punish him with loss for his negligent and fraudulent conduct."

15—Lehman v. Central R. etc. Co., 12 Fed Rep., 595.

16—Burwell v. Orr, 84 Ill., 465.

17—Grant v. State, 8 Tex. App., 432.

18—Davidson v. Cooper, 11 M. & W., 778; Osborn v. Van Houten, 45 Mich., 444.

19—Pew v. Laughlin, 3 Fed. Rep., 39.

20—Burgwin v. Bishop, 91 Pa. St., 336.

21—Martin v. Tradesmen's Ins. Co., 101 N. Y., 498.

22—Gillett v. Sweat, 6 Ill., 489; C. A. Nat. Bank v. Burns, 129 Mass., 596; Miller v. Finley, 26

bills of exchange;[23] checks;[24] chattel mortgages;[25] and all classes of simple contracts.[26] As said by Justice Haile, "There is no substantial reason why this rule should not be applied to notes and to all other written contracts as well as to deeds; for all such instruments are the evidence of the contracts between the parties, and whatever alteration, therefore, changes the legal effect of the instrument makes it another and not the same contract, and it should no longer in law bind the party, because it is not the contract by which he agreed to be bound."[72] The rule is also applicable to written assignments of contracts,[28] and instruments of a merely evidentiary character, such as receipts and bills of sale.[29]

§ 5. **Same. Bona fide purchasers of negotiable instruments.** —A material alteration of a negotiable promissory note, by the payee or transferee, without the consent of the maker or transferor, avoids the note as against the maker, or any indorser prior to the one who makes the alteration, even as to a *bona fide* indorser for value and without notice.[30] But the *bona fide* indorsee may still look to any indorser subsequent to the party who makes the alteration.[31] The same principle is applicable to a negotiable bill of exchange. Thus, where the payee of a bill of exchange makes a material alteration in it after acceptance it vitiates the instrument even in the hands of a *bona fide* indorsee for value.[32] It has been held, however, that in such a case the remedy of the holder is confined to a

Mich., 249; Barnett v. Nolte, 55 Mo. App., 184; Fitch v. Ellis, 5 El. & Bl., 28.

23—Fountaine v. Gunter, 31 Ala., 258; Anderson v. Langdale, 3 B. & Ad., 660.

24—Crawford v. West Side Bank, 100 N. Y., 50; Belknap v. National Bank of North America, 100 Mass., 376; Vance v. Lowther, 1 Exch Div., 176.

25—Hollingsworth v. Holbrook, 80 Ia., 151.

26—Boston v. Benson, 12 Cush., (Mass.), 61.

27—Arnold v. Jones, 2 R. I., 345.

28—Minert v. Emerick, 6 Wis., 469.

29—Babb v. Clemson, 10 Sarg. & R. (Pa.), 419; 13 Am. Dec., 684.

30—Burwell v. Orr, 84 Ill., 465; Bank v. Clark, 51 Ia., 264; Capital Bank v. Armstrong, 62 Mo., 59; Greenfield Savings Bank v. Stowell, 123 Mass., 198.

31—Washington Savings Bank v. Ecky., 51 Mo., 272.

32—Master v. Miller, 4 T. R., 320.

recovery on the consideration of the bill as between himself and the party from whom he receives it.[33]

§ 6. **Same. Certified checks.**—A material alteration by the drawer, of a check which has been certified to by the bank, avoids it in the hands of the drawee or assignee, and the bank is relieved from liability on it.[34]

§ 7. **Same. Innocent assignee of a mortgagee.**—A material alteration by a mortgagee, without the consent of the mortgagor, after its execution and delivery, avoids the instrument even in the hands of an innocent assignee, and prevents a foreclosure by him.[35]

§ 8. **Filling blanks.**—The effect of filling in blanks in an instrument after its execution and delivery, by the grantee or promisee, or by the agent of the grantor or promisor, depends upon the circumstances of the particular case. As a general rule, where such blanks are evidently meant to be filled in he has implied authority to do so; and the performance of this act by him does not invalidate the instrument. As regards all simple contracts, this rule is universal; but as regards sealed instruments the decisions are in hopeless conflict. In regard to the latter, some courts hold that parol authority to fill in the blanks is sufficient; while others hold that authority under seal is essential. In an early English case,[36] Lord Mansfield held that parol authority was sufficient; but Baron Parke overruled that decision,[37] and his view is the established doctrine which now obtains in England.[38] In this country some courts have followed the modern English rule,[39] and some have re-

33—Burchfield v. Moore, 3 El. & Bl., 683. In this case Chief Justice Campbell says, in substance that a similar remedy is available against any indorser subsequent to the party who makes the alteration.

34—Abrams v. Union Nat. Bank, 31 La. Ann., 61.

35—Coles v. Yorks, 28 Minn., 464.

36—Texira v. Evans, not reported, but referred to by Justice Wilson in 1 Aust., 228 (33 Geo. III.)

37—Hibblewhite v. M'Morine, 6 M. & W., 200.

38—Enthoven v. Hoyle, 9 Eng. L. & Eq., 434. See also Bishop on Contracts, section 1168.

39—People v. Organ, 27 Ill., 27; Chase v. Palmer, 29 Ill., 306 (but see Dounell Mfg. Co. v. Jones, 49 Ill App., 327, case of a bond); Burns v. Lynde, 6 Allen (Mass.), 305; Barden v. Southerland, 7 N.

pudiated it.[40] The latter courts hold that the rule which requires authority under seal to execute a sealed instrument is confined in its application to the *making* of a sealed instrument by one person for another, and that it is not applicable to the mere completion of an imperfect sealed instrument. As said by Justice Kent, "When the instrument is a sealed instrument, when signed by the party, the filling in of the blanks afterwards by another is not, strictly speaking, the execution of a sealed instrument. That has already been done by the party himself. The third party does not make it a specialty by his act. It was one before. The filling up merely perfects an imperfect sealed deed or bond."[41] Some courts, which sustain this view, say that sealed instruments, in which blanks are filled in pursuance of parol authority *expressly* given, are valid. Upon principle, however, an *implied* authority is equally effectual; and the courts generally so hold.[42] It is essential, however, that such an implication be fairly and legally inferable from all the circumstances of the particular case.[43] Thus, it has been held, that the holder of a promissory note containing a blank space for the date has implied authority to fill in the date;[44] that the holder of such an instrument containing a blank space for the amount has implied authority to fill in the true amount.[45] If, however, the holder fill in an amount different from the true one, it invalidates the instrument, except in the hands of a *bona fide* indorsee.[46] Where a note contains a blank space for time, or place of payment, the holder has implied authority to fill in such space

C., 528; Ingram v. Little, 14 Ga., 173, 58 Am. Dec., 549.

40—Berwick v. Huntress, 53 Me., 89, 87 Am. Dec., 535; Swartz v. Ballou, 47 Ia., 188; Deury v. Foster, 2 Wall. (U. S.), 24; Bridgeport Bank v. New York, etc., Ry. Co., 30 Conn., 274.

41—South Berwick v. Huntress, 53 Me., 89, 87 Am. Dec., 535.

42—South Berwick, *supra;* State v. Young, 23 Minn., 551.

43—Swartz v. Ballou, 47 Ia., 188, 29 Am. Rep., 470; State v. Young, *supra.*

44—Gill v. Hopkins, 19 Ill. App., 74; Weyerhauser v. Dun, 100 N. Y., 150; Bechtel's Estate, 133 Pa. St., 367.

45—Eichelberger v. Old Nat. Bank, 103 Ind., 401.

46—Green v. Sneed, 101 Ala., 205.

with the proper time,[47] or place.[48] And where a blank space is left for the name of the payee it may be filled in by any proper holder with his own name.[49] And the holder of a negotiable instrument indorsed in blank may insert the name of an indorsee.[50] Where the maker of a deed authorizes his agent by parol to fill in blanks and deliver the deed to the grantee, and the agent fills in the blanks without the knowledge of the grantee, the maker is estopped from denying that the instrument as delivered is his deed. This rule obtains even in those states which deny the sufficiency of parol authority to fill blanks in sealed instruments.[51]

§ 9. **Ratification of alterations.**—A material alteration if legally authorized is binding upon the consenting parties; and an act which is susceptible of authorization may also be ratified. It follows, therefore, that a material alteration which has been ratified will be binding upon the parties; and the courts hold that a new consideration to support the ratification is not essential.[52] In the case of sealed instruments, those courts which sustain the sufficiency of parol authority to fill blanks, sustain the sufficiency of parol authority to ratify such acts;[53] while those that deny the former also deny the latter.[54] In the case of simple contracts, including negotiable instruments, a ratification by parol is sufficient.[55]

§ 10. **Alterations in wills.**—The effect of alterations in wills depends upon the following considerations: (1) The manner in which they are made; (2) The intent which accompanies the making of them; (3) The party who makes them; and (4) The time at which they are made. Alterations by codicil, by mutilation or obliteration, made by the testator with intent to revoke the instrument, will, if properly done, have that effect.

47—Johns v. Harrison, 20 Ind., 324.

48—Canon v. Grigsby, 116 Ill., 151; Redlich v. Doll, 54 N. Y., 234.

49—Dunham v. Clogg, 30 Md., 284.

50—Croskey v. Skinner, 44 Ill., 321.

51—McNab v. Young, 81 Ill., 11; Phelps v. Sullivan, 140 Mass., 36.

52—Montgomery v. Crossthwait, 90 Ala., 553.

53—State v. Young, 23 Minn., 551.

54—Saus v. People, 8 Ill., 327; Kilkelly v. Martin, 34 Wis., 525.

55—Stewart v. Port Huron First Nat. Bank, 40 Mich., 348.

Under the English statute of frauds, obliterating or cancelling one or more clauses of a will by the testator, with intent to revoke the same, had that effect, provided the act did not result in creating a new legacy or devise, or in enlarging an existing one.[56] Under the English Wills Act (1 Vict. Chap. 26), however, a subsequent formal re-execution of the will is essential to have that effect.[57] Similar statutes have been passed in New York[58] and in some other states. Alterations made by a stranger are ineffectual provided the original can be proved.[59] Alterations by a legatee or devisee in a bequest or devise, avoids his interest in the bequest or devise, but not that of any other legatee or devise.[60] It does not, however, avoid other bequests or devises in the will to him. Mere additions to the will by the testator, after the execution of the will, are void, unless he formally re-execute the will.[61] Where void alterations are made, and the original is not decipherable, the altered part is read in blank.[62] Alterations which are made after the execution of the will are void, unless the will is formally re-executed, and where the latter is not done the will should be probated as originally made.[63]

§ 11. **Alterations made accidentally or by mistake.**—Alterations made accidentally or by mistake do not invalidate the instrument, or affect in any way the rights and liabilities of the parties to it.[64] As stated in 2 Cyc. 146, "whenever it is clear that an instrument once perfect has become multilated or defaced by accident or the effect of time, such multilation or effacement operates nothing against its validity."

§ 12. **Alterations made to correct mistakes of expression.**—Upon the question as to the effect of an alteration made with the view of correcting a mistake of expression and making the instrument conform to the intention of the parties, the decis-

56—Eschbach v. Collins, 61 Md., 478.

57—*In re* Goods of Wilkinson, 6 Probate Div., 100.

58—Lovell v. Quitman, 88 N. Y., 377.

59—Camp v. Shaw, 52 Ill. App., 241; Doane v. Hadlock, 42 Me., 72.

60—Doane v. Hadlock, *supra.*

61—Stevens v. Stevens, 6 Dem. (N. Y.) 262.

62—Townley v. Watson 3 Cent., 761.

63—Stevens v. Stevens, *supra.*

64—Milbery v. Storer, 75 Me., 69, 46 Am. Rep., 361; Newton v. Bramlett, 55 Ill. App., 661, 663.

ions are in hopeless conflict. Many cases hold that such an alteration is proper and does not invalidate the instrument, on the ground that the holder has implied authority to make it. This view obtains in England, and in New York, Massachusetts, Michigan, Alabama, Connecticut, Georgia, Indiana, Mississippi, Arkansas, California, Wyoming and Utah.[65] On the other hand, many courts hold the contrary, on the ground that to allow tampering with a written instrument is dangerous. This view obtains in Illinois, Iowa, Ohio, Pennsylvania, Tennessee, Virginia, Missouri, Nebraska and Maine.[66]

§ 13. **Material alterations versus immaterial alterations.**—As previously stated in this chapter (§ 1), a material alteration is one which changes the legal effect of the instrument; and an immaterial alteration is one which does not. As stated in one case,[67] the former "is one which causes the paper to speak a language different in legal effect from that which it originally spoke." Thus, adding words of negotiability to a non-negotiable note;[68] changing a name in the body of the instrument, or changing a signature;[69] changing the time, manner or place of payment;[70] changing the date of the instrument;[71] affixing a seal to a promissory note or other simple contract;[72] adding the signature of an attesting witness;[73] erasing a clause restricing negotiability;[74] substitut-

65—Booth v. Powers, 56 N. Y., 22; Osborn v. Hall, 160 Ind., 153; Nichols v. Johnson, 10 Conn., 192; Produce Exchange, etc. Co., v. Breberbach, 176 Mass., 577; Hanson v. Crawley, 41 Ga., 303; Sill v. Reese, 47 Cal., 294; Johnson v. Johnson, 66 Mich., 525.

66—Ryan v. First Nat. Bank, 148 Ill., 349; Chamberlain v. White, 79 Ill., 549; Newman v. King, 54 Ohio St., 273; Taylor v. Taylor, 80 Tenn., 714; Dobyns v. Rawley, 76 Va., 537; Miller v. Gilleland, 19 Pa. St., 119; Murray v. Graham, 29 Ia., 520.

67—Mahoiwe Bank v. Douglass, 31 Conn., 170, 181.

68—Union Nat. Bank v. Roberts, 45 Wis., 373; Needles v. Shaffer, 60 Ia., 65; Eckert v. Louis, 84 Ind., 99.

69—Abbott v. Abbott, 189 Ill., 488; Mason v. Bradley, 11 M. & W., 590; Houck v. Graham, 106 Ind., 195.

70—Wyman v. Yeomans, 84 Ill., 403; Winter v. Pool, 100 Ala., 503.

71—Johnson v. Johnson, 66 Mich., 525; Wood v. Steele, 6 Wall. (U. S.) 80; Miller v. Gilleland, 19 Pa. St., 119. See also notes in 10 Am. Dec., 268, 71 Am. Dec., 724 and 17 Am. Rep., 101.

72—Rawson v. Davidson, 49 Mich., 607.

73—Homer v. Wallis, 11 Mass.,

ing the words "or bearer" for the words "or order";[75] erasing the signature of an attesting witness;[76] removing the seal from a specialty;[77] altering the descriptive part of a contract or deed so as to change the identity of the subject-matter;[78] changing the consideration;[79] adding the words "more or less" to a stated quantity;[80] obliterating a restrictive indorsement;[81] are material alterations. While on the other hand, tracing with ink words written in pencil, or retracing faded words;[82] correcting a person's initials or Christian name whereby his identity is not changed;[83] erasing a scroll and substituting a seal;[84] changing the word "we" to "I" in the clause "we hereby guarantee," in an instrument signed by only one person;[85] changing serial numbers in notes or bonds;[86] are immaterial alterations.

§ 14. **Presumptions and burden of proof.**—As regards these two topics, the decisions, with reference to the subject of alterations in writings, are in hopeless conflict. Thayer says, "As regards the proof of alterations in documents the cases are full of confusion. Fragments of substantive law embrace the rules of evidence relating to this subject; and it is further intolerably perplexed by a quantity of jargon about presumptions and the burden of proof which often conceals the lack of

309; Fisher v. King, 153 Pa. St., 3; Brockett v. Mountfort, 11 Me., 115. *Contra*, Fuller v. Green, 64 Wis., 159, 54 Am. Rep., 600.

74—State v. Stratton, 27 Ia., 420; Cochran v. Nebeker, 48 Ind., 459.

75—Belknap v. Nat. Bank of N. A., 100 Mass., 376; Needles v. Shaffer, 60 Ia., 65.

76—Sharpe v. Bagwell, 1 Dev. Eq. (N. C.) 115.

77—Evans v. Williamson, 79 N C., 86; Piercey v. Piercey, 5 W. Va., 199.

78—Montag v. Linn, 23 Ill., 551; Sherwood v. Merritt, 83 Wis., 233.

79—Knill v. Williams, 10 East 431; Benjamin v. McConnell, 9 Ill., 536, 46 Am. Dec., 474. But see Gardiner v. Harback, 21 Ill., 129, and Mayers v. Dunlap, 39 Ill., App., 618.

80—Sherwood v. Merritt, 83 Wis., 233.

81—Mechanics' Bank v. Valley Packing Co., 70 Mo., 643.

82—Reed v. Roark, 14 Tex., 329, 65 Am. Dec., 127.

83—Carr v. Welch, 46 Ill., 88; Hanrick v. Patrick, 119 U. S., 156.

84—Keen v. Monroe, 75 Va., 424.

85—Kline v. Raymond, 70 Ind., 271.

86—Suffel v. Bank, 9 Q. B. D., 555; Com. v. Emigrant, etc., Bank, 98 Mass., 12; State v. Cobb, 64 Ala., 127.

any clear apprehension of the subject on the part of those who use it, and often disguises the true character of sound decisions."[87] Stephen says, "Alterations and interlineations appearing on the face of a deed are, in the absence of all evidence relating to them, presumed to have been made before the deed was completed. Alterations and interlineations appearing on the face of a will are, in the absence of all evidence relating to them, presumed to have been made after the execution of the will. There is no presumption as to the time when alterations and interlineations appearing on the face of writings, not under seal, were made, except that it is presumed that they were so made that the making would not constitute an offense."[88] Reynolds, in his modification of Stephen's statement, with the view of making it conform to the American rule, says, "Alterations and interlineations appearing on the face of a document will, generally speaking, be presumed to have been made contemporaneously with the execution of the instrument, but if any ground of suspicion is apparent upon the face of the instrument the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which the alteration was made, as matter of fact to be ultimately found by the jury upon proofs to be adduced by the party offering the instrument in evidence."[89] Taylor says, "It was formerly a presumption of law, that an interlineation, if nothing appeared to the contrary, had been made contemporaneously with the execution of the instrument; and this presumption still prevails in the case of a deed, because a deed cannot be altered after its execution without fraud or wrong, and fraud or wrong is never assumed without some proof. Indeed, it may be laid down as a general rule, that wherever it is an offense to alter a document after it has been completed, the law presumes, *prima facie,* that any alteration apparent on it was made at such a time and under such circumstances as not to constitute an offense. With respect, however, to a bill of ex-

87—Thayer's Preliminary Treatise on Evidence, p. 527.

88—Stephen's Digest of Evidence, Art. 89.

89—Reynolds' Stephen on Evidence, Art. 89.

change, or a promissory note, the law presumes nothing, but leaves the jury to decide, first, by inspecting the instrument itself, whether any alteration has been made; and when, on considering the extrinsic circumstances, such alteration, if any, was made. These last questions cannot be solved by the jury on the mere inspection of the writing, for juries must decide, not on conjecture, but on proof."[90]

Where an alleged alteration is not apparent on the face of the instrument, the courts hold, very generally, that the burden of showing that an alteration was made is upon the party alleging it.[91] Where, however, the alteration is apparent upon the face of the instrument the decisions are very conflicting. Generally speaking, there seem to be six, more or less distinct, views. These six views are as follows: (1) A presumption exists that the alteration was made contemporaneously with, or before, the execution of the instrument; (2) A presumption exists that it was made after the execution of the instrument; (3) No presumption exists in any case as to the time when it was made; (4) No presumption exists as to the time when it was made if no suspicious circumstances are apparent on the face of the instrument, but where there are suspicious circumstances connected with it there is a presumption that it was made after the execution of the instrument; (5) As a general rule, it is presumed to have been made contemporaneously with the execution of the instrument, but if any ground of suspicion is apparent upon the face of the instrument the law presumes nothing; (6) The presumption, if any, which arises, depends upon the character of the instrument.[92] The first of these views is based largely on the presumption of innocence, and is recognized in numerous decisions.[93] The second view is supported by comparatively few decisions, and it has been severely criticised.[94] It still obtains, however, in a few jurisdic-

90—3 Taylor on Evidence, sec. 1819.

91—Glover v. Gentry, 104 Ill., 222; Sturm v. Boker, 150 U. S., 312; Montgomery v. Crossthwait, 90 Ala., 553; 24 Am. St. Rep., 832; McClintock v. State Bank, 52 Neb., 130, 171 N. W. Rep., 987.

92—86 Am. St. Rep., note.

93—Hunt v. Gray, 35 N. J. L., 27; Hagan v. Merchants' Ins. Co., 81 Ia., 321, 25 Am. St. Rep., 493; Lewis v. Watson, 98 Ala., 479, 39 Am. St. Rep., 82; Brand v. Johnrowe, 60 Mich, 210.

94—Wilson v. Hayes, 40 Minn., 531.

tions,[95] and seems to be confined for the most part to negotiable instruments.[96] The third view is supported by many decisions,[97] and is characterized by at least one recent author[98] as the better view. The fourth view is supported by decisions of several leading courts.[99] The fifth view, according to Reynolds, as quoted above, is the American rule.[1] While the sixth view is supported by Stephen and Taylor, as quoted above, and also by Greenleaf,[2] as well as by many decisions.[3]

§ 15. **Parol evidence. Admissions.**—Where its purpose is to show an unauthorized or fraudulent alteration of a written instrument, oral evidence is admissible notwithstanding the Parol Evidence Rule.[4] Such evidence is admissible to show when, by whom, and under what circumstances, an alteration was made.[5] And oral admissions are receivable in evidence to prove an unauthorized or fraudulent alteration.[6]

§ 16. **Expert opinion evidence.**—Expert opinion evidence is admissible to show, among other things, whether or not the instrument in issue has been altered;[7] when the alteration, if

95—Gettysburg Nat. Bank v. Chisolm, 169 Pa. St., 565, 32 Atl. Rep., 730; Humphreys v. Guillow, 13 N. H., 385, 38 Am. Dec., 499.

96—Beama v. Russell, 20 V. F., 205, 49 Am. Dec., 775.

97—Merritt v. Boyden, 191 Ill., 136, 60 N. E., 907; Ward v. Cheney, 117 Ala., 238, 22 So. Rep., 996; Simpson v. Davis, 119 Mass., 269, 20 Am. Rep., 324; Wilson, v. Haynes, 40 Minn., 531, 42 N. W. R., 467, 12 Am. St. Rep., 754, 4 L. R. A., 196; Martin v. Tuttle, 80 Me., 207, 14 Atl. Rep., 207.

98—2 Elliott on Evid., § 1505.

99—Smith v. United States, 69 U. S., 219; Powell v. Panks, 146 Mo., 620; Alabama, etc., Land Co. v. Thompson, 104 Ala. 570, 53 Am. St. Rep., 80; Collins v. Ball, 82 Tex., 259, 27 Am. St. Rep., 877; Bradley v. Dells Lumber Co., 105 Wis., 245.

1—Reynolds' Stephen on Evidence, Art. 89.

2—Greenleaf on Evidence, § 564.

3—Bailey v. Taylor, 11 Conn., 531, 541; Boothby v. Stanley, 34 Me., 515, 516. See also Simpson v. Davis, 119 Mass., 269, 270.

4—Johnson v. Pollock, 58 Ill., 151; Sweet v. Naupin, 65 Mo., 65;

5—Smith v. Jayoe, 172 Mass., 538; Hunter v. Parsons, 22 Mich., 96.

6—Winters v. Moweer, 163 Pa. St., 239; Booth v. Powers, 56 N. Y., 22.

7—Vinton v. Peck, 14 Mich., 287; Nelson v. Johnson, 18 Ind., 329.

any exists, was made;[8] and whether or not the alleged alterations are in the same hand-writing as the rest of the instrument.[9]

§ 17. **Province of court and jury.**—It is the province of the court to determine whether or not an alteration is material;[10] and the province of the jury to determine whether or not an alteration was made,[11] whether or not consent was given[12] and by whom the alteration was made.[13]

8—Rass v. Sebastian, 160 Ill., 602; Dubois v. Baker, 30 N. Y., 355.

9—Eisfield v. Dill, 71 Ia., 442; Glover v. Gentry, 104 Ala., 222.

10—Milliken v. Marlin, 66 Ill., 13; Deum v. Deum, 133 Mass., 566.

11—Schwarz v. Herrenkind, 26 Ill., 208; Hunt v. Gray, 35 N. J. L., 175, 11 Am., Dec. 546.

12—De Long v. Soucie, 45 Ill., App., 234; Benedict v. Miner, 58 Ill., 19; White v. Hass, 32 Ala., 430, 70 Am. Dec., 548.

13—Millikin v. Marlin, 66 Ill., 13; Wilson v. Hayes, 40 Minn., 531, 42 N. W. Rep., 467; Martin v. Kline, 157 Pa. St., 473, 27 Atl. Rep. 753.

CHAPTER III.

PROOF OF CONTENTS. THE BEST EVIDENCE RULE.

§ 1. **The rule.**—Unless a legally sufficient reason is shown for not doing so, proof of the contents of a document must be made by producing the document itself. This is known as the Best Evidence Rule.

§ 2. **A more comprehensive statement of the rule by Stephen.**—The rule as stated by Stephen is as follows: "When any judgment of any court, or any other judicial or official proceeding, or any contract or grant, or any other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant or other disposition of property except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."[1]

§ 3. **Origin and development of the rule.** The rule is of ancient origin. Originally, however, it had a much broader meaning than at present. According to the early view, it meant not only that the best evidence obtainable must be produced, but also that the best evidence of which the nature of the case would permit was admissible. Moreover, it was applicable to all classes of evidence and not confined to documents. On the other hand, according to the modern view, it means that the best evidence attainable must be produced unless a legally sufficient reason is shown for the introduction of secondary evidence. Moreover, according to this view, the rule is applicable only to documents. It is not, however, confined to documents which relate to matters required by law to be in writing, but is applicable to all classes of documents.

1—Stephen's Digest of Evidence, art. 90.

The development of the rule was very peculiar. As stated by Thayer, "During the latter part of the seventeenth century and the whole of the eighteenth, while rules of evidence were forming, the judges and text writers were in the habit of laying down two principles, namely: (1) that one must bring the best evidence that he can, and (2) that, if he does this, it is enough. These principles were the beginnings in the endeavor to give consistency to the system of evidence before juries. They were never literally enforced; they were principles, and not exact rules; but for a long time they afforded a valuable test. As rules of evidence and exceptions to the rules became more definite, the field for the application of the general principle of the "best evidence" was narrower. But it was often resorted to in a manner which was very misleading. This is still occasionally done, as when we are told in McKinnon v. Bliss, 21 N. Y. 218, that "it is a universal rule, founded in necessity, that the best evidence of which the nature of the case admits is always receivable" . . . Always the chief example of the "best evidence" principle was the rule about proving the contents of a writing. But the origin of this rule about writings was older than the "best evidence" principle, and that principle may well have been a generalization from this rule, which appears to be traceable to the doctrine of profert. That doctrine required the actual production of the instrument which was set up in pleading. In like manner it was said, in dealing with a jury that a jury could not specifically find the contents of a deed unless it had been exhibited to them in evidence. And afterwards when the jury came to hear testimony from witnesses it was said that witnesses could not undertake to speak to the contents of a deed without the production of the deed itself."[2]

§ 4. **Secondary evidence. Its meaning and scope.**—Secondary evidence, as heretofore defined (page 1, § 3), is evidence which is admissible when the primary evidence is not obtainable, and which, owing to this fact, is the best evidence which can be adduced. It may be oral evidence of the contents of a document, or a copy of such contents. According to Stephen, it comprises the following four divisions: (1) Ex-

2—Thayer's Cases on Evid. (1st edition), p. 726, note.

amined copies, exemplifications, office copies, and certified copies; (2) Other copies made from the original and proved to be correct; (3) Counterparts of documents as against the parties who did not execute them; (4) Oral accounts of the contents of a document given by some person who has himself seen it.

§ 5. **When secondary evidence is admissible.**—Before secondary evidence becomes admissible, a proper foundation must be laid for its introduction by showing that a good and sufficient reason exists for not producing the original document. In the following cases secondary evidence is admissible: (1) When the original is lost and a reasonable but unsuccessful search has been made for it.[3] (2) When the original is in the hands of the adverse party and he fails to produce it, after receiving reasonable notice to do so.[4] When the original is beyond the jurisdiction of the court;[5] (4) When the nature of the original is such as to render it practically immovable.[6] (5) When the original is in the hands of a stranger who is not legally bound to produce, and who, after being served with a *subpoena duces tecum,* or after being sworn and admitting that the original is in court, refuses to produce it;[7] (6) When the original consists of numerous documents which cannot be examined conveniently in court, and the general result of all of them is the fact sought to be proved, and that fact is ascertainable by calculation, and the witness who testifies to it is skilled in the examination of such documents;[8] (7) When the evidence offered is collateral to the fact in issue;[9] (8) When the original is a public document;[10] and (9) When the original has been recorded according to law, and a copy of the same, duly authenticated by the proper officer, is made admissible in evidence by statute.[11]

3—Riggs v. Taylor, 9 Wheat. (U. S.) 483, 486.

4—Turner v. Yates, 16 How. (U. S.) 14, 26.

5—Burton v. Driggs, 20 Wall. (U. S.) 125, 134.

6—N. Brookfield v. Warren, 16 Gray, 171, 174.

7—Brandt v. Klein, 17 Johns. (N. Y.) 335.

8—Burton v. Driggs, 20 Wall. (U. S.) 125, 136.

9—Coonrod v. Madden, 126 Ind. 197.

10—Whitehouse v. Beckford, 9 Foster, 471, 480; 1 Greenleaf on Evid. §§ 91, 508.

11—Patterson v. Winn, 5 Pet. (U. S.) 233, 241.

§ 6. **Degrees of secondary evidence.**—Upon this question both text writers and decisions are at variance. According to the English rule there are no degrees of secondary evidence.[12] Phillipps says, "In secondary evidence there are no degrees, no precedence in point of admissibility."[13] Starkie says, "With reference to the question of admissibility there are no degrees of secondary evidence, but where it is admissible at all, even parol evidence may be received, notwithstanding an attested copy or other better secondary evidence is in existence."[14] To the same effect are Best,[15] Taylor[16] and the earlier editions of Greenleaf. Elliott says, "The rule established, and clearly deducible from the majority of American authorities, however, as to secondary evidence is the same in effect as the rule between primary and secondary evidence; that is, that when secondary evidence is properly admissible, it must be the best that in the nature of the case can be produced, or the best kind of that character of evidence which appears to be in the power of the party to produce."[17] The English rule, which recognizes no degrees of secondary evidence, obtains in a few American jurisdictions, including Massachusetts[18] and Indiana;[19] but in most of the American jurisdictions,[20] including Illinois,[21] the contrary rule obtains. This latter rule also obtains in the federal courts.[22] The Supreme Court of the United States say, "The principle established by this court as to secondary evidence . . . is, that it must be the best the party has in his power to produce."[23] In Nebraska the rule

12—Doe v. Ross, 7 M. & W. 102; Rex v. Hunt, 3 B & Ald. 506.

13—2 Phillips on Evid. (10th Eng. ed.) p. 568.

14—Starkie on Evid. (8th Amer. ed.) p. 544.

15—2 Best on Evid. (1st Amer. ed.) § 483.

16—Taylor on Evid. § 495.

17—2 Elliott on Evid., p. 515.

18—Smith v. Brown, 151 Mass. 338; Com. v. Smith, 151 Mass. 491.

19—Carpenter v. Dame, 10 Ind. 125.

20—Phillips v. U. S. Benev. Soc., 125 Mich. 186; Georgia Pac. Ry. Co. v. Propst, 90 Ala. 1; C. C. C. & St. L. Ry. Co. v. Newlin, 74 Ill. App. 638, 647.

21—Mariner v. Saunders, 10 Ill. 113; Ill. Land, etc., Co. v. Bonner, 75 Ill. 315; Protection Life Ins. Co. v. Dill, 91 Ill. 174.

22—Renner v. Bank of Columbia, 9 Wheat. (U. S.) 581.

23—Cornett v. Williams, 20 Wall. (U. S.) 226.

is, "When the primary is not obtainable a party may resort to any evidence otherwise competent; and his choice of one class of secondary evidence instead of another goes to the weight of the evidence and not to its admissibility."[24] This is in harmony with the English rule.

§ 7. **Same. Burden of proof.**—In those jurisdictions which recognize degrees of secondary evidence a presumption arises that such evidence when offered is the best of its kind obtainable; and the burden of showing the contrary rests upon the party who objects to it. As aptly stated by Justice Creighton, "Where satisfactory proof is made of loss or inability to produce an instrument which the law does not make provision for recording and copying, and the evidence fails to disclose the existence of any copy or other evidence better than parol known to the offering party and within his power to produce, and there is nothing appearing to indicate a copy, or fraud or deception, then the presumption arises that there is no copy or other evidence better than parol within the power of the party to produce, a *prima facie* case is made for the admission of parol testimony of the contents of the instrument, and such testimony will be admitted, unless the objecting party will produce the better evidence or show that it does exist and was known to and might have been produced by the offering party."[25]

§ 8. **Proof of search in the case of lost documents.**—Proof that a document is lost will not in itself justify admitting secondary evidence of its contents. Such proof is essential, but it must be followed by proof of a *bona fide* and diligent search for the original. The degree of diligence required depends upon the circumstances of the particular case.[26] It is not sufficient for a witness to state in general terms that he made a *bona fide* and diligent search. He must also state the details.[27] In some states, however, including Illinois, it is provided by

24—Rawlings v. Y. M. C. A., 48 Neb. 216.

25—C. C. C. & St. L. Ry. Co. v. Newlin, 74 Ill. App. 638, 647.

26—Davis v. Teachout, 126 Mich. 135, 85 N. W. R. 475.

27—Booth v. Cook, 20 Ill. 129; Shepherd v. Pratt, 16 Kan. 209; Smith v. Coker, 110 Ga. 650, 36 S. E. R. 105.

statute that a certain affidavit stating the facts in regard to the loss of a document will justify the introduction of a certified copy of a record of it.[28] But an affidavit which merely shows that certain deeds are not, and have not been, in the possession, custody or control of the affiant, that affiant has made inquiry of the grantees but has not received any of the deeds, and that he does not believe such deeds have been lost or destroyed or disposed of for the purpose of introducing copies of them, is not sufficient to justify admitting secondary evidence of their contents.[29] The rule, in regard to proof of search, which was laid down by Justice Caton in an early Illinois case,[30] and which has been followed in this state since, is as follows: "When from the ownership, nature or objects of a paper it has properly a particular place of deposit, or where from the evidence it is shown to have been in a particular place or in particular hands, then that place must be searched by the witness, proving the loss, or the person produced into whose hands it has been traced. The extent of the search to be made in such place or by such person must depend, in a great degree, upon circumstances. Ordinarily, it is not sufficient that the paper is not found in its usual place of deposit, but all the papers in the office or place should be examined. But this need not always be done when from the extent of the archives or office it would be impracticable, and the order in which it is kept a more limited examination is equally satisfactory. In all cases the search must be made in the utmost good faith, and should be as thorough and vigilant as, if the paper were not found, its benefits would be lost. On the whole, the court must be satisfied that the paper is destroyed or cannot be found. It is true the party need not search every possible place where it might be found, for then the search might be interminable; but he must search every place where

28—Newsom v. Luster, 13 Ill. 175; Bowman v. Wettig, 39 Ill. 416; Foot v. Silliman, 77 Tex. 268, 13 S. W. R. 1032.

29—Scott v. Bassett, 186 Ill. 98.

30—Mariner v. Saunders, 10 Ill. (5 Gilm.) 113. See also, Doyle v. Wiley, 15 Ill. 576; Rankin v. Crow, 19 Ill. 626; Hanson v. Armstrong, 22 Ill. 445; Dickinson v. Breeden, 25 Ill. 186; Pardee v. Lindley, 31 Ill. 184; Huls v. Kimball, 52 Ill. 394; Chicago, etc. Ry. Co. v. Ingersoll, 65 Ill. 404; Scott v. Bassett, 174 Ill. 390.

there is a reasonable probability that it may be found. Nor must he produce every man upon the stand into whose hands rumor alone may have traced it, for if the inquiry is only suggested by hearsay, it may be answered by hearsay. If, on the other hand, legal testimony shows it to have been in a particular place, or if the natural and legitimate presumption is that it is in certain hands, then it must be proved by legal evidence that it is not there.'' When the proof offered to lay the foundation for secondary evidence is by oral testimony instead of by affidavit, the opposing counsel may test the statements of the witness by cross-examining him; and a refusal by the trial court to permit such a cross-examination may be prejudicial error.[31]

§ 9. **Same. Destruction of original by proponent.**—The admissibility of secondary evidence of the contents of a document which has been destroyed by the proponent depends upon the circumstances of the particular case. The object of the ''Best Evidence Rule'' is to prevent fraud. If the destruction was with fraudulent intent such evidence is inadmissible. If the act was voluntary and deliberate a presumption arises that it was fraudulent; and the burden is upon the proponent to overcome it. Failure on his part renders the presumption conclusive. The controlling element, therefore, is the motive with which the act was done. As said by Justice Field, ''The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible is the prevention of fraud; for if a party is in possession of this evidence and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises that the better evidence is withheld for fraudulent purposes which its production would expose and defeat. When it appears that this better evidence has been voluntarily and deliberately destroyed, the same presumption arises, and unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary or inferior evidence is rejected. If, however, the destruction was made upon an erroneous impression of its effect, un-

31—Scott v. Bassett, 174 Ill. 390.

der circumstances free from suspicion of intended fraud, the secondary evidence is admissible. The cause or motive of the destruction is, then, the controlling fact which must determine the admissibilty of this evidence in such cases."[32] And as said by Justice Todd, "It will be admitted that where a writing has been voluntarily destroyed with an intent to produce a wrong or injury to the opposite party, or for fraudulent purposes, or to create an excuse for its non-production, in such cases the secondary proof ought not to be received. But in cases where the destruction or loss, although voluntary, happens through mistake or accident, the party cannot be charged with default."[33]

§ 10. **Same. Notice or demand to produce the original.**—When a document, whose contents are sought to be shown by secondary evidence, is in the hands of the adverse party or under his control, a reasonable notice or demand to produce the original is usually essential. To this general rule, however, there are exceptions.

§ 11. **Same. Erroneous reasons for the rule. The true reason.**—For the rule which requires that a reasonable notice or demand be given to produce the original document, various reasons have been assigned. Some of these reasons, however, are quite fantastic. Thus, Lord Chief Justice Ellenborough says, "The reason of giving notice . . . was to check a person from giving in evidence what was a false copy."[34] Justice Le Blanc says, "We see the good sense of the rule which requires previous notice to be given . . . that he may not be taken by surprise."[35] And Chief Justice Merrick says, "The reason of the rule is that possibly the instrument, when produced, will be less favorable to the plaintiff than the parol proof which they may obtain."[36] All of the foregoing reasons, however, are erroneous. Greenleaf says, "the object of the notice is not only to procure the paper, but to give the

32—Bagley v. McMickle, 9 Cal. 430, 446.

33—Riggs v. Taylor, 9 Wheat. (U. S.) 483, 487.

34—Sturtees v. Hubbard, 4 Esp. 203.

35—How v. Hall, 14 East 274, 276.

36—Williams v. Benton, 12 La. Ann. 91.

party an opportunity to provide the proper testimony to support or impeach it."[37] The latter part of this reason is also erroneous. It has been repudiated in England,[38] and is not recognized in this country.[39]

The true reason for the rule may be stated as follows: Since to render secondary evidence admissible, the party seeking to introduce it must show that he has made every reasonable effort to procure the original, if he has knowledge that the original is in the hands of the adverse party, or under his control, and omits to notify him to produce it, he falls short of making the effort required. Justice Porter says, "The elementary principle, which requires that the best evidence the nature of the case permits of shall be produced, . . . refuses to a party permission to give secondary evidence of a written document on the ground of its being in possession of his adversary, until he has shown that by giving notice to that adversary to produce it, he has used every exertion in his power that the best evidence might be had."[40] Chief Justice Tilghman says, "Notice must be served on him or his attorney to produce it, because otherwise it cannot appear that the prosecutor might not have had the original if he had chosen to call for it.[41] And Baron Parke, in assigning the true reason for the rule, says, that it is "merely to exclude the argument that the party has not taken all reasonable means to procure the original; which he must do before he can be permitted to make use of secondary evidence."[42]

§ 12. **What constitutes reasonable notice.**—What constitutes reasonable notice depends upon the circumstances of the particular case. It is a question which rests largely in the sound discretion of the court. When it is required to be served before the trial, it should be in writing. Justice Caton says, "A party is not bound to pay any attention to a verbal notice to produce

37—1 Greenleaf on Evid. § 563d.

38—Dwyer v. Collins, 7 Exch. 639.

39—Ferguson v. Miles, 8 Ill. 358, 364; Hanselman v. Doyle, 90 Mich. 142; Bickley v. Bank, 39 S. C. 281.

40—Abat v. Rion, 9 Mart. La. 465, 467.

41—Com. v. Messinger, 1 Binn. 273, 274.

42—Dwyer v. Collins *supra.*

a paper on the trial of a cause, where notice is required to be served before trial. The notice should be in writing, that the party may know with certainty and precision what paper is wanted; and he shall not be compelled to rely on his memory alone for its identity.

"Whether the written notice was served in time was a matter of sound discretion with the court, as such a question must always depend on the peculiar circumstances of each case. Where it appears to the court that the party has the desired paper, notice given on the trial would be sufficient; but when this does not appear, the notice should be served a reasonable time before the trial at which it is wanted; unless, indeed, the paper wanted be one which the party must have known would be indispensable to his adversary and that he could not sustain his action, or make good his defence, without it; in which case it is unnecessary to give any further notice; but the party must take notice himself that the paper will be wanted on the trial, and bring it with him accordingly."[43] If the document is at hand at the trial, and in the hands of the adverse party, an immediate demand is sufficient. The reason for this rule is well stated by Baron Parke.[44]

43—Cummings v. McKinney, 4 Scam. (Ill.) 58. See also Warner v. Campbell, 26 Ill. 282; C. C. C. & St. L. Ry. Co. v. Newlin, 74 Ill. App. 638, 645; Lawrence v. Clark, 14 M. & W. 250, 253.

44—Dwyer v. Collins *supra*. In this case Baron Parke says: "The next question is whether, the bill being admitted to be in court, parol evidence was admissible on its non-production, or whether a previous notice to produce was necessary. On principle, the answer must depend upon the reason why notice to produce is required. If it be to give his opponent notice that such a document will be used by a party to the cause, so that he may be enabled to prepare evidence to explain or confirm it, then no doubt a notice at the trial, though the document be in court, is too late. But if it be merely to enable the party to have the document in court, to produce it if he likes, and if he does not, to enable the opponent to give parol evidence,—if it be merely to exclude the argument that the opponent has not taken all reasonable means to procure the original (which he must de before he can be permitted to make use of secondary evidence), then the demand of production at the trial is sufficient. . . . . We think the plaintiff's alleged principle is not the true one on which notice to produce is required, but that it is merely to give a sufficient opportunity to the opposite party to produce it and thereby secure if

§ 13. **When notice to produce is not essential.**—Cases arise where notice to produce is not essential. Thus, no notice is essential in the following cases: (1) When the document is lost or destroyed; (2) When the one to be produced and the one to be proved are duplicate originals; (3) When the document to be proved is itself a notice; and (4) When from the nature of the action the defendant has notice that the plaintiff intends to charge him with possession of the document.

The rule requiring that notice be given the adverse party to produce the original document, before secondary evidence of its contents is admissible, is founded upon the assumption that such original is in his possession. If, therefore, it is shown that the document is lost or destroyed, notice to produce would be of no avail, and for this reason is not essential.[45] When documents are made in duplicate, each is regarded as an original, and notice to produce is not necessary because the adverse party can contradict the duplicate, in case they vary, by producing the other.[46] And when documents are made in counterpart each is regarded as an original.[47] When the document to be proved is itself a notice, no further notice, as a general rule, is essential. Thus, a landlord's notice to quit, or a notice of the dishonor of a bill of exchange or promissory note, is sufficient notice in itself. It is sometimes said that "a notice to produce a notice is not necessary." In most cases this statement is applicable;[48] but cases arise where a notice to

he pleases the best evidence of the contents; and a request to produce immediately is quite sufficient for that purpose, if it be in court. . . It would be some scandal to the administration of the law if the plaintiff's objection had prevailed."

And Justice Mills says: "The design of the notice is that the party may be apprized of the necessity of bringing it in. If it is already there, demand of its production is sufficient notice." 2 J. J. Marsh. 587, 592. See also, Ferguson v. Miles, 8 Ill. 358; Bell v. Ry. Co., 64 Ia. 321, 322; McGregor v. Wait, 10 Gray, 72, 73, 75.

45—Den v. M'Allister, 7 N. J. L. 46, 55.

46—Cleveland Ry. Co. v. Perkins, 17 Mich. 296; Hollenbeck v. Stanberry, 38 Ia. 325; Doe v. Somerton, 7 Q. B. D. 58.

47—Gardner v. Eberhart, 82 Ill. 316; Doe v. Palmer, 3 Q. B. D. 622.

48—Brown v. Booth, 66 Ill. 419 (notice to surety); Williams v. Ins. Co. 68 Ill. 387, 390 (notice of assessment); Falkner v. Beers, 2 Doug. (Mich.) 117, 119 (notice to quit); Barr v. Armstrong, 56

produce a notice is essential.[49] Some decisions expressly say that notice is not required in the case of *any* written notice;[50] but this statement is too broad. When the nature of the action is such as to give the defendant notice that the plaintiff intends to charge him with possession of the document no further notice to produce it is essential. As stated by Justice Le Blanc, "Where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such an instrument, there can be no necessity for giving him any other notice."[51] This exception to the rule is applicable to criminal cases as well as civil.[52] It is essential, however, that the accused be charged in the pleadings with the possession of the document.[53] In larceny and forgery cases, especially the former, the exception is peculiarly applicable,[54] but it has been applied in other criminal cases.[55] A good deal, however, depends upon the nature of the charge.[56]

Mo. 577, 586 (notice not to sell on credit to wife); Loranger v. Jardine, 56 Mich. 518 (notice by wife not to sell liquor to husband).

49—R. & B. Ry. Co. v. Thrall, 35 Vt. 536, 547 (Notice of assessment. In this case the court say, "There are many cases where notices given during the progress of a cause—notices to produce papers and notices to quit—have been allowed to be proved by copies and in some instances by parol evidence, without proof of notice to produce the originals;" but the rule is otherwise as regards "notices essential to the cause of action"); Frank v. Longstreet, 44 Ga. 178; Langdon v. Hulls, 5 Esp. 156.

50—Barr v. Armstrong, 56 Mo. 577, 586. See also, Morrow v. Com. 48 Pa. St., 305, 308; Brown v. Booth, 66 Ill. 419.

51—How v. Hall, 14 East, 274, 277 (trover for a bond. In this case Lord Chief Justice Ellenborough says, "Is not the very nature of the action notice to the defendant to be prepared for the proof to be offered?"); Rose v. Lewis, 10 Mich. 483, 484 (trover for a note).

52—McGinnis v. State, 24 Ind. 500 (larceny of treasury-note); R. v. Haworth, 4 C. & P. 254, 256 (forgery of deed); People v. Sweatland, 77 Mich. 53.

53—R. v. Elworthy, 10 Cox Cr. Ca. 579, 582 (perjury case). In this case Justice Littledale says, "The exception to the rule is when the other party is by the proceeding itself charged with the possession of the document."

54—See cases cited in foot-note 52.

55—State v. Mayberry, 48 Me. 218, 239 (conspiracy by false pretenses to obtain a promissory note).

56—Wigmore on Evid. Vol. II. § 1205.

§ 14. **Consequences of refusal to produce.**—When the document is in the possession of the adverse party, and, after a reasonable demand has been made, he refuses to produce it at the trial, the consequences are as follows: (1) The party who makes the demand may introduce secondary evidence of the contents of the document; (2) The adverse party is estopped from introducing the document to contradict the secondary evidence; (3) The jury may draw inferences unfavorable to him from his refusal to produce the document; and (4) Under statutes allowing discovery and inspection, judgment by default, in some cases, may be entered against him; while in other cases he is expressly prohibited from introducing the document at the trial.

The application of the doctrine of estoppel, in a case of this kind, is regarded as the infliction of a penalty on the adverse party for resorting to unfair tactics. Chief Justice Gray says, "A party who has suppressed a written document, and refused to produce it upon notice, and so compelled the adverse party to resort to secondary evidence thereof, is not afterwards entitled to offer proof of its contents."[57] And in criticizing the rule, Chief Justice Campbell says, "It is not a rule calculated to further the eliciting of truth; it is simply an attempt to punish one party by allowing his adversary to recover what does not belong to him or to defend unjustly against a proper claim."[58] Baron Alderson says, "You must either produce a document when it is called for or never."[59] That the jury may well draw inferences from a suppression of the document, unfavorable to the party so withholding it, is quite palpable. For a collection of statutes which entitle a party to discovery and inspection, and which provide the penalties stated in (4) above, see Wigmore on Evidence, § 1858.

§ 15. **The document in the hands of a third party.**—When the document is in the hands of a third party, whether notice to produce is essential or not depends upon the circumstances of the particular case. If the document is "privileged," notice

57—Gage v. Campbell, 131 Mass. 566.

58—Moulton v. Mason, 21 Mich. 363, 370. See also, Tewksbury v. Schulenberg, 48 Wis. 577, 580.

59—Doe v. Cockell, 6 C. & P. 525, 528.

to produce it is not essential to the introduction of secondary evidence of its contents. As stated by Chief Baron Pollock, "If in point of law you cannot compel a party who has the custody of a document to produce it, there is the same reason for admitting other evidence of its contents as if its production were physically impossible."[60] If the third party is hostile and fraudulently suppresses the document, notice to produce it is not essential. As said in a Pennsylvania case, "where it (the document) has been in the hands of a third person, who, in collusion with the adverse party or with a view of screening him, has put it out of the way" secondary evidence is admissible.[61] As a general rule, however, when the document is in the hands of a third party notice to produce is essential to the introduction of secondary evidence of its contents. Some courts hold that in such cases a *subpoena duces tecum* is essential.[62] A few courts hold the contrary.[63] The better view seems to be that it depends upon the circumstances of the particular case, and also that it is a matter which rests to some extent in the sound discretion of the court.

Some courts hold that the mere fact that the third party who has possession of the document is without the jurisdiction of the court does not excuse notice to produce.[64] Many courts, however, comprising probably the weight of authority, hold the contrary view.[65]

§ 16. Application of the Best Evidence Rule to chattels, and inscriptions on chattels.—Originally, as heretofore stated (§ 3), the Best Evidence Rule was applied to all classes of evidence.

60—Sayer v. Glossop, 2 Exch. 409, 410. See also, State v. Durham, 121 N. C. 546, 28 S. E. R. 26 (document in hands of wife who claimed privilege, held production excused).

61—Gray v. Pentland, 2 Sarg. & R. (Penn.) 23, 31. See also, Blevins v. Pope, 7 Ala. 371, 375 (trover for promissory note which maker had received from defendant and by collusion failed to produce, held production excused).

62—Dickerson v. Talbot, 14 B. Monroe (Ky.) 60, 63; Whitford v. Tutin, 10 Bing. 395.

63—U. S. v. Reyburn, 6 Pet. 352, 365.

64—Waite v. High, 96 Ia. 742, 65 N. W. R. 397; Phillips v. U. S. Benf. Soc'y, 120 Mich. 142, 79 N. W. R. 1; Boyle v. Wiseman, 10 Exch. 647 (document was in hands of a party in France).

65—Mitchell v. Jacobs, 17 Ill. 235 (lease sent to Cal., production excused).

Thus, Lord Kenyon, in 1797, applied it to a bushel-measure;[66] and as late as 1835 it was applied to a dog.[67] In each of these cases the court rejected oral evidence descriptive of the chattel, and insisted that the chattel itself must be produced in court. According to the modern view, however, the application of the rule is limited to writings. Whether it is applicable or not to inscriptions on chattels, is a matter upon which the courts do not agree. Upon principle, it should apply to such inscriptions as well as to other writings, unless owing to inherent difficulties an exception to the rule should be made. Thus, if the chattel containing the inscriptions can be produced in court with as little difficulty as a sheet of paper containing a written contract, upon principle the rule should apply to the former case as well as to the latter. On the other hand, if it be impracticable to produce the chattel, this fact should excuse its nonproduction. Again, the application of the rule should not depend upon the number of words or abbreviations contained in the writing, nor upon their character or purpose. Some decisions, however, hold that when the purpose of the inscription is merely to identify the chattel the rule has no application; while others hold that when the inscription is intended as a public manifestation of sentiment or feeling it partakes of the character of a speech rather than of a writing, and for this reason the rule has no application. Thus, in a robbery case in which oral evidence of an inscription on a tag which had been detached from a valise was objected to, Chief Justice Chapman says, "In the present case, the tag referred to was not a document, but an object to be identified. The words written upon it served to identify it; and the court are of opinion that oral evidence was admissible for this purpose, and that it was not necessary to produce the tag."[68] And in a criminal conspiracy and sedition case, in which oral evidence of inscriptions on flags was objected to, Chief Justice Abbott says, "With respect to the last point, the reception of the evidence as to the inscriptions on the flags or banners, I

66—Chenie v. Watson, Peake Add. Cas. 123.

67—Lewis v. Hartley, 7 C. & P. 405.

68—Com. v. Morrell, 99 Mass. 542 (1868).

think it was not necessary either to produce the flags or to give notice to the defendants to produce them. . . . Inscriptions used on such occasions are the public expression of the sentiments of those who bear and adopt them, and have rather the character of speeches than of writings. If we were to hold that words inscribed on a banner so exhibited could not be proved without the production of the banner, I know not upon what reason a witness should be allowed to mention the color of the banner, or even to say that he saw a banner displayed, for the banner itself may be said to be the best possible evidence of its existence and its color."[69] It is to be observed, however, that to remember the mere existence or color of a thing is a much simpler matter than to remember the exact words of an inscription. Moreover, slight inaccuracies with respect to the words of an inscription may effect very materially its legal significance. Justice Maule, after quoting Chief Justice Abbott's statement given above, says, "I confess that it is not very satisfactory to me, for the circumstances of its being a public expression of feeling is no reason why the best proof should not be given. The reason why the writings are to be produced is because that is so much better a way of proving it than having it from the memory of anyone else."[70] As previously stated, the courts, upon this question, do not agree. In the following cases the rule has been applied: to the inscription on a ring;[71] to the inscription on the wrapper of a butter-package;[72] to the plan of a house;[73] to forged paper-money;[74] to the inscription on a coffin plate;[75] and to the direction on a parcel.[76] In the following cases it has been held not to apply: to shipping-marks on barrel-heads;[77] to a superscription on an envelope;[78] to labels of

69—King v. Hunt, 3 B. & Ald. 566 (1820).

70—Reg. v. Hinley, 1 Cox Cr. Cas. 13 (1843). In this case the rule was applied to the address on a hamper.

71—Reg. v. Farr, 4 F. & F. 336 (1864).

72—Write v. State, 88 Md. 436, 41 Atl. Rep. 495 (1898).

73—Bryant v. Stilwell, 24 Pa. St. 314, 317 (1855).

74—State v. Blodgett, 1 Root 152 (1793).

75—Reg. v. Edge. Wills, Circ. Evid., 5th Am. ed. 212.

76—Burrell v. North, 2 C. & K. 680, 682 (1847).

77—U. S. v. De Graff, 14 Blatch, 381, 385 (1878).

78—U. S. v. Babcock, 3 Dillon

"rye whiskey" on jugs;[79] and to an inscription on boxes of a passenger killed on a railroad.[80]

§ 17. **Same. Professor Wigmore's view.**—Professor Wigmore says, "It is impossible to say that any settled doctrine has found favor respecting the application of the rule to material objects, not paper, bearing inscriptions in words. There are inherent difficulties. It is impracticable to base any distinction upon the material bearing the inscription; for a notice-board or a tombstone may deserve the application of the rule as well as a sheet of note-paper. Nor is it practicable to distinguish according to the number of words; for each number is but one higher than the preceding, and a broker's note of ten words or a baggage-check of a few initials may need inspection as much as a lengthy lease for ninety-nine years. Nor can the purpose of the words be material; for the memorandum-tick made for private verification may become as important as the deed intended for public registration. No Court seems to have attempted, and certainly no Court has achieved, a satisfactory test for the distinction drawn. There are precedents requiring and precedents not requiring production,—precedents often entirely irreconcilable if one were seeking an inflexible rule. But there is no reason for making such a rule; the rational and practical solution is to allow the trial Court in discretion to require production of an inscribed chattel wherever it seems highly desirable in order to ascertain accurately a material fact."[81]

§ 18. **Rule limited to the terms of the document.**—The application of the Best Evidence Rule is confined to the *terms* of the document. *Other facts* concerning the document may be shown by extrinsic evidence. In applying this principle, how-

571, 574 (1876). But the rule has been held applicable to a post mark on an envelope. See Rex v. Johnson, 7 East 65, 66.

79—Com. v. Blood, 11 Gray 74, 77 (1858).

80—Kansas Pac. Ry. Co. v. Miller, 2 Colo. 442, 451, 462. In this case the court say, "if a sign were painted on a house, it would hardly be contended that the house would have to be produced, nor can it be said that the law converts the court-room into a receptacle for wagons, boxes, tombstones, and the like, on which one's name may be written."

81—Wigmore on Evid. Vol. II., § 1182.

ever, the courts are at variance. Thus, some courts hold that, to prove the following facts, production of the documents is not essential: *ownership* of property;[82] *transfer* of land;[83] *transfer* of personalty,[84] *tenancy;*[85] *payment;*[86] *sale* of a note;[87] *conversion* of a document;[88] *delivery* or *publication* of a notice;[89] and *performance* of *services* in printing and publishing advertisements in a newspaper.[90] While other courts, as regards some of these facts, as indicated in the foot-notes, hold the contrary. In the case of Lamb v. Moberly, cited in foot-note [87], Justice Mills says, "We cannot agree . . . that the production of the note was necessary. It could only be held necessary by not attending to the distinction between proving the existence and contents of a note and the sale of a note. Of the former, the note is the better evidence; but of the latter the note furnishes no evidence. . . . The existence of a note is as certainly perceived by the senses or acknowledged in conversation as that of any other article of commerce; and it might as well be urged that before the acknowledgments of a sale of any other article could be given in evidence the article itself must be produced in court in order that the Court might see that it really existed, as that a note thus sold should be produced."

82—Street v. Nelson, 67 Ala. 504; *contra:* Kirkpatrick v. Clark, 132 Ill. 342; Westfield Cigar Co. v. Ins. Co., 169 Mass. 382.

83—Showman v. Lee, 86 Mich. 556; *contra:* Primrose v. Browning, 56 Ga. 369.

84—Sirrine v. Briggs, 31 Mich. 443; *contra:* Price v. Wolfer (Or.) 52 Pac. Rep. 759.

85—Taylor v. Peck, 21 Grat. (Va.) 11; *contra:* Gilbert v. Kennedy, 22 Mich. 5, 18.

86—Chambers v. Hunt, 22 N. J. L. 552; Davidson v. Peck, 4 Mo. 438; Cramer v. Shrimer, 18 Md. 140.

87—Lamb v. Moberly, 3 T. B. Monroe (Ky.) 179.

88—Bucher v. Jarratt, 3 B. & B. 143 (leading case).

89—Lingle v. Chicago, 172 Ill. 170.

90—Enloe v. Hall, 1 Humph. (Tenn.) 303, 310.

CHAPTER IV.

THE PAROL EVIDENCE RULE.

§ 1. **The rule.**—Parol evidence is inadmissible to vary, add to, take from, or contradict, the terms of a document, or to modify its legal import.

§ 2. **Origin and meaning of the term 'parol.'**—The term 'parol' is of French origin. Its literal meaning is word, or speech. In this sense it is synonymous with the term 'oral.' In practice, however, it also has a conventional meaning. As applied to contracts, it means not under seal. In other words, a parol contract is a simple contract, as distinguished from a contract under seal. It may be in writing, or merely oral. If a contract under seal be subsequently modified by oral agreement of the parties it will become thereby wholly parol.[1] At common law, it is not essential to allege in the pleadings that a parol contract is in writing, though by law it is required to be. This is owing to the fact that the import of a parol contract is, that it is made by the mere agreement of the parties and not by an instrument under seal. The fact that it is in writing is a matter of evidence.

The term 'parol,' as used in the law of pleadings, has also a conventional meaning. The pleadings themselves are called the *parol;* and in some cases the term is used to denote the entire pleadings in the cause.[2]

In the law of evidence, the term is also used in a conventional sense. As used in the phrase, 'Parol Evidence Rule,' it is synonymous with the term 'verbal,' as distinguished from the term 'oral.'[3] These two terms, however, are often incorrectly used interchangeably. They are not, however, synony-

1—Munroe v. Perkins, 26 Mass. 298.

2—3 Black. Com. 300.

3—Bouvier's Law Dict. 576. See also the excellent note in 56 Am. St. Rep. 659, and the scholarly article in 6 Harvard Law Review 325, by the late Professor Thayer.

mous. The former means "relating to words," and is applicable to both written and oral words; whereas the latter means "spoken," as distinguished from "written," and is applicable to sentences as well as words. Professor Wigmore, in discussing the use of the term 'parol,' says: "The matter excluded by the rule is not inherently or even most commonly anything that can be properly termed 'parol.' That word (in spite of its numerous other derived applications) signifies and implies essentially the idea 'oral,' i. e. matter of speech, as contrasted with matter of writing. Now, so far as the phrase 'parol evidence rule' conveys the impression that what is excluded is excluded because it is oral—because somebody spoke or acted other than in writing, or is now offering to testify orally—, that impression is radically incorrect. When the prohibition of the rule is applicable, what is excluded may equally be written as oral,—may be letters and telegrams as well as conversations; and where the prohibition is applicable on the facts to certain written material, nevertheless for the very same transaction certain oral material may not be prohibited. So that the term 'parol' not only affords no necessary clue to the material excluded, but is even positively misleading. It must be understood to be employed in a purely unnatural and conventional sense."[4]

§ 3. **Origin and development of the 'Parol Evidence Rule.'** —Originally, the rule was applied only to *sealed* instruments. At that time it was not regarded as a rule of evidence, but rather as a matter of 'averment.' The objectionable feature was not the proving of the extrinsic matter, but rather the making it an issue for the purpose of impugning the document. In 1771 the English Court of Common Pleas extended the rule to written contracts not under seal. Such contracts were regarded as parol contracts; but the court declared that "no parol evidence is admissible to disannul and substantially to vary a written agreement."[5]

§ 4. **Misapplication of the rule.**—Since the Court of Common Pleas, in 1771, extended the Parol Evidence Rule to written contracts not under seal, many courts have treated it as a

4—Wigmore on Evid., Vol. IV., page 3369.

5—Meres v. Ansell, 3 Wils. Com. Pleas 275.

rule of evidence. The term, however, is largely a misnomer. This is owing to the fact that the rule, in a large measure, is one of substantive law. Especially is this true where the law requires that the evidence of the thing to be proved shall be in writing. Professor Thayer, in speaking of the rule, says: "Few things in our law are darker than this, or fuller of subtle difficulties. It appears to me that the chief reason for it is that most of the questions brought under this rule are out of place; it is true, in a very great degree, that a mass of incongruous matter is here grouped together, and then looked at in a wrong focus. Because the rule deals with evidences, with writings,—things the nature of which it is to be evidence of what they record,—it is assumed that it belongs to the law of evidence. But in truth most of the matters with which it is concerned have nothing to do with the law of evidence. It heightens the confusion, however, to find that some of them belong there."[6]

§ 5. **Reasons for the rule.**—The two chief reasons for the rule are, (1) The uncertainty of memory, and (2) The danger of falsehood. Lord Coke assigns as the reason for it the uncertainty of "slippery memory."[7] Justice Bell assigns "the treachery of memory and the falsehood of men."[8] Chief Justice Shaw says, "The rule is founded on the long experience, that written evidence is so much more certain and accurate than that which rests in fleeting memory only, that it would be unsafe, when parties have expressed the terms of their contract in writing, to admit weaker evidence to control and vary the stronger, and to show that the parties intended a different contract from that expressed in the writing signed by them."[9] Justice Sewall says, "The preference, which the law gives to written evidence, when compared with parole testimony, of parole agreements, is the unavoidable result of experience. It is impossible to expect or attain that certainty and exactness in the one form of evidence, which is found in the other. When a contract has been stated in a writing assented to and signed

6—6 Harvard Law Review 325.
7—Rutland's Case, 5 Coke 26.
8—Rearick's Executors v. Rearick, 15 Pa. St. 66, 72.
9—Underwood v. Simonds, 12 Metc. (Mass.) 275.

by the parties concerned, and that continues in being, and under the control of the party relying upon it, evidence of the other parole agreements, to explain or vary the written contract, would be a rejection of that evidence, which is necessarily the best."[10] Justice Dean, in quoting with approval Thayer, P. J., says, "If it were not for the rule no man would be able to protect himself by the most solemn forms and attestations against falsehood, misrepresentation and perjury."[11]

§ 6. **Merger of prior and contemporaneous agreements conclusively presumed.**—When the parties to a contract have reduced their negotiations to a complete and perfect written agreement, all prior and contemporaneous oral agreements pertaining to it are, as a general rule, conclusively presumed to have been merged in the document; and evidence of such prior and contemporaneous oral agreements is inadmissible. Justice Caton, in an early Illinois case, says, "The rule is, where a contract is reduced to writing, that the writing affords the only evidence of the terms and conditions of the contract. All antecedent and contemporaneous verbal agreements are merged in the written contract."[12] Chief Justice Bailey says, "where parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing, and that all oral testimony of a previous colloquium between the parties, or of conversations or declarations at the time when it was completed, must be rejected."[13] Justice Craig says, "Where parties reduce their contract to writing, the law presumes that the whole terms and conditions of the agreement are fully incorporated in and become a part of the written instrument."[14] And Chief Justice Magruder says, "When parties, after whatever previous prepara-

10—Hunt v. Adams, 7 Mass. 518, 521.

11—Irvin v. Irvin, 169 Pa. St. 529, 546.

12—Lane v. Sharpe, 3 Scam. (Ill.) 566, 572.

13—U. N. Bank of Chicago v. L. N. A. & C. Ry. Co., 145 Ill. 208, 221.

14—Conwell v. S. & N. W. Ry. Co., 81 Ill. 232, 234.

tion, reduce their agreement to writing, such written agreement is the final consummation of their negotiation, and the exact expression of their purpose. What has preceded it, if not incorporated into it, is regarded as intentionally rejected."[15]

§ 7. **Exceptions and limitations.**—The Parol Evidence Rule, though quite general in its application, has numerous exceptions and limitations. Much confusion exists, however, in their application. Some so-called exceptions are in fact only *apparent* exceptions. They define, in a way, the scope of the rule, and constitute, in a sense, limitations. Justice Vann, in commenting upon the rule, says, "This rule is not universal in its application, because the courts, in their effort to prevent fraud and injustice, have laid down certain exceptions, which although correct in principle, are sometimes so loosely applied in practice as to threaten the integrity of the rule itself."[16] Taylor, in a general statement of the limitations of the rule, says, it "applies only (1) between the parties; (2) to exclude parol evidence; (3) when the effect is to vary, contradict or control; (4) when the purport of the instrument has been ascertained; (5) and provided it affirmatively appears that the parties have intended to have the instrument embody their agreement and understanding."[17]

§ 8. **Stephen's comprehensive statement.**—Stephen, in his "Digest of the Law of Evidence," gives the following comprehensive statement of matters which may be proved by parol evidence, notwithstanding the Parol Evidence Rule:

"(1) Fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law, or any other matter, which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto.

(2) The existence of any separate oral agreement as to any

15—Graham v. Sadler, 165 Ill. 95, 98.

16—Thomas v. Scutt, 127 N. Y. 133, 137, 138.

17—Taylor's Evid. (Chamberlayne's ed.) 808, note.

matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.

(3) The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property.

(4) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, provided that such agreement is not invalid under the statute of frauds or otherwise.

(5) Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description; unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract.

Oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, or other disposition of property.

Oral evidence of the existence of a legal relation is not excluded by the fact that it has been created by a document, when the fact to be proved is the existence of the relationship itself, and not the terms on which it was established or is carried on.

The fact that a person holds a public office need not be proved by the production of his written or sealed appointment thereto, if he is shown to have acted in it."[18]

§ 9. **Existence and validity of the contract.**—When the question in issue is the execution, delivery, acceptance or validity of a contract, the Parol Evidence Rule is not applicable. Thus, parol evidence is admissible to show, that an alleged contract was never executed, owing to want of authority of the person who signed it;[19] that there was no valid delivery;[20] that it is

18—Stephen's Digest of Evidence, art. 90.

19—Sherman v. Buick, 93 U. S. 209; Rennick v. Sanford, 118 Mass. 102.

20—Price v. Hudson, 125 Ill. 284; Curry v. Colburn, 99 Wis. 319.

in violation of law;[21] that although delivered it was not to take effect until the approval of a particular person;[22] that the person who signed it was incapable of making a contract;[23] that it was signed in the presence of the party sought to be charged, and at his request;[24] that it was executed on a certain day, at a particular place, and under particular circumstnces;[25] that it was fraudulently altered, the time when, and the party by whom, it was done;[26] that it is usurious;[27] that the party sought to be charged was fraudulently induced to enter into it;[28] that in reducing it to writing there was a mutual mistake of fact;[29] that the minds of the parties did not meet;[30] that it was never intended to be operative between the parties, and that in fact the real contract was an oral one;[31] that it was not to take effect except upon certain conditions;[32] that two instruments bearing different dates were in fact executed at the same time and as parts of the same transaction.[33]

21—Stackpole v. Arnold, 11 Mass. 27; Friend v. Miller, 52 Kan. 139.

22—Pym v. Campbell, 6 El. & Bl. 370 (In this case Justice Earle says: "If it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those signing. The distinction in point of law is, that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible"). See also, Burke v. Dulaney, 153 U. S. 228; Cleveland Ref. Co. v. Dunning, 115 Mich. 238.

23—Faye v. Patch, 132 Mass. 105; Lord v. Am. Mut., etc. Assoc., 89 Wis. 19; Dan v. Clark, 10 N. J. L. 258.

24—Morton v. Murray, 176 Ill. 54.

25—Chandler v. Morez, 195 Ill. 596; Wilbur v. Stoepel, 82 Mich. 344.

26—Montgomery v. Crossthwait, 90 Ala. 553; Winters v. Mowser, 163 Pa. St. 239; Richards v. Day, 137 N. Y. 183; Johnson v. Pollock, 58 Ill. 181.

27—Ferguson v. Sutphen, 8 Ill. 547; Roe v. Kiser, 62 Ark. 92, 34 S. W. R. 534, 54 Am. St. Rep. 288.

28—Barrie & Son v. Frost, 105 Ill. App. 187; Givan v. Masterson, 152 Ind. 127; Trambly v. Ricard, 130 Mass. 259.

29—Silbar v. Ryder, 63 Wis. 106; Habbe v. Viele, 148 Ind. 116. See also notes in 6 L. R. A. 46, and 30 Am. St. Rep. 642, 648.

30—Stone v. Daggett, 73 Ill. 367.

31—Robinson v. Nessel, 86 Ill. App. 212 (citing 76 Ill. App. 669).

32—Ottawa, O. & F. R. Val. Ry. Co. v. Hall, 1 Ill. App. 612.

33—Greenebaum v. Gage, 61 Ill. 46.

§ 10. **Incomplete documents.**—Incomplete documents are not within the scope of the Parol Evidence Rule. A contract which is partly in writing and partly oral is regarded as a parol contract; and extrinsic evidence is admissible to prove the oral part, provided such evidence is not repugnant to the written part. It is sometimes said that a contract cannot exist partly in writing and partly in parol. Thus, Justice Scholfield says, "No principle of law is better settled than that the evidence of a contract can not exist partly in writing and partly in parol."[34] This statement, however, is apt to be misleading. To be correct, it must either assume that the written part is complete in itself or merely mean that if the whole of a contract has not been reduced to writing it rests entirely in parol.[35] For it is well settled that where a valid, complete, verbal contract is partly reduced to writing, the rest may be shown by parol evidence.[36] Justice Burroughs says, "The rule excluding parol evidence does not apply when the original contract was verbal and entire and a part only is reduced to writing."[37] Justice Walker says, "It is one of the most familiar rules to the profession that a contract can not rest partly in writing and partly by verbal understanding between the parties, hence all prior propositions and negotiations are superseded by the written contract."[38] The latter clause of the quotation shows that the writing is assumed to be a complete contract in itself. Justice Green says, "It is evident, therefore, that the whole of the actual contract between the parties, being partly in parol and partly in writing, must all be considered, in order to determine what the contract really was. The principle that a contract which is partly in writing and partly in parol becomes all parol is too familiar to require the citations of authorities."[39] And Justice Brown says, "Where a contract in writing shows upon its face that it is

34—Hartford Fire Ins. Co. v. Webster, 69 Ill. 392, 393.

35—Am. & Eng. Ency. of Law, Vol. 21, p. 1089.

36—McCray Refrig., etc., Co. v. Woods, 91 Mich. 273, 41 Am. St. Rep. 599.

37—Estate of Casner v. Stafford, 86 Ill. App. 469, 471 (citing Greenleaf on Evid. Vol. I, § 284; Ludeke v. Sutherland, 87 Ill. 431).

38—Longfellow v. Moore, 102 Ill. 289, 294.

39—Schwab v. Ginkinger, 181 Pa. St. 8, 14.

not the whole contract between the parties, and does not purport to be a complete agreement, parol evidence is admissible to show what was the whole contract, and the same then becomes all parol."[40]

In this class of cases, therefore, parol evidence is held admissible to complete the entire contract of which the writing is only a part. It is to be observed, however, that to bring a case within this class, two things are essential: (1) The writing must not appear upon inspection to be a complete contract;[41] (2) The parol evidence must be consistent with the written evidence.[42] As a general rule, however, the inspection of the writing is to be made in the light of attendant facts and circumstances.[43] Chief Justice Start says, "In considering whether or not a particular writing is an incomplete contract, within the rule stated, the controlling question is whether it appears upon the face of the writing that the parties intended it to be the exclusive evidence of their agreement. While the writing itself is the only criterion by which the intention of the parties is to be ascertained, yet it is not necessary that the incompleteness of the writing should appear on its face from a mere inspection of it, for it is to be construed in the light of its subject-matter and the circumstances under which and the purposes for which it was executed."[44] Some courts, however, follow a more rigid rule. Thus, Justice Depue says, "The only safe criterion of the completeness of a writ-

40—Selig v. Rehfuss, 195 Pa. St. 200, 206. See also, Platt v. Ætna Ins. Co., 153 Ill. 121; Union Nat. Bank v. Louisville, etc., Ry. Co., 145 Ill. 208; Ebert v. Arends, 190 Ill. 221.

41—Thomas v. Scutt, 127 N. Y. 133, 138 (In this case Justice Vann says, "The writing must not appear upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole agreement between the parties, for in such a case it is conclusively presumed to embrace the entire contract." He also says, "The parol evidence must be consistent with and not contradictory of the written instrument"); Ryder v. Faxon, 171 Mass. 206; Buhl v. Mechanics' Bank, 123 Mich. 591.

42—Horn v. Hanson, 56 Minn. 46; Radigan v. Johnson, 174 Mass. 68; Gardner v. Mathews, 81 Mo. 627.

43—Burton v. Morrow, 133 Ind. 221; Peabody v. Bement, 79 Mich. 47; Fawkner v. Smith Wall Paper Co., 88 Ia. 169. See also, Illinois cases cited in foot note 40.

44—Potter v. Easton, 82 Minn. 247.

ten contract as the full expression of the terms of the parties' agreement is the contract itself. . . If the written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something has been left out to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is not admissible."[45] See also quotation from Justice Vann's opinion in foot-note [41].

§ 11. **Collateral contemporaneous or prior parol agreements.**—In some cases agreements of this class are admissible and in some cases they are not. In the following cases they are admissible: (1) Where the subject-matter of the collateral parol agreement is independent and distinct from that to which the written contract relates;[46] (2) Where the purpose of introducing the parol agreement is to show that the written contract was not to become binding until the performance of some condition precedent resting in parol;[47] and (3) Where the purpose of the action is to recover damages for breach of the parol agreement, and not to defeat an action on the written contract.[48] But where the collateral parol agreement and the written agreement relate to the *same* subject-matter, and the latter agreement is complete upon its face, the former agreement is conclusively presumed to be merged in the latter, and evidence to show the former is inadmissible to vary, or contradict the latter.[49] It is to be observed, however, that the decisions pertaining to this subject are not harmonious. Many hold that where the purpose of introducing the parol agreement in evidence is not to vary or contradict the written contract, but to establish an additional collateral agreement, the parol agreement is admissible.[50] The test given by one writer is as follows: "If it interferes with the

45—Naumberg v. Young, 44 N. J. L. 331.

46—Lindley v. Lacey, 17 C. B. Div., N. S., 578.

47—Curtis v. Harrison, 36 Ill. App. 287; Michaels v. Olmstead, 157 U. S. 198; Thomas v. Barnes, 156 Mass. 583; Cleveland Refining Co. v. Dunning, 115 Mich. 238.

48—Abbott's Trial Evid. (2nd ed.) 649, note; Purinton v. Northern Ill. Ry. Co., 46 Ill. 297; Gardner v. Lightfoot, 71 Ia. 577.

49—Patterson v. Park, 166 Pa. St. 25; Stevens v. Pierce, 151 Mass. 207; Patek v. Waples, 114 Mich. 669; Costello v. Eddy, 128 N. Y. 650.

50—Snowden v. Guion, 101 N. Y. 458, 462.

writing it cannot be proved; if, on the other hand, it relates to a matter beyond the scope of the written contract, the writing does not affect it. . . In each case it must be determined from the character of the writing and from the circumstances of the case, whether the parol agreement offered to be proved was in regard to a matter which it is reasonable to infer the parties thought settled by the terms of the writing, and if it was, evidence to show it should be excluded. The writing must speak just so far as it is fair to conclude that the parties, acting as reasonable men and using intelligible language, intended it should speak, and no farther."[51]

§ 12. **Same. Oral warranties.**—As regards the question of admissibility of parol evidence to establish an oral warranty, the decisions are not harmonious. Upon principle, however, and by the weight of authority, such evidence is inadmissible to modify a written contract complete on its face.[52]

§ 13. **Usage and custom.**—As a general rule, parol evidence is admissible to show usage or custom, provided such evidence is not repugnant to the written contract.[53] It is not admissible, however, if inconsistent with the terms of the contract;[54] or with a sound and well-settled rule of law;[55] nor is it admissible if unreasonable.[56] When admissible, the usage or custom is considered as forming part of the contract by implication. As stated by Justice Coleridge, "In all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they com-

51—Jones Constr. of Com. & Trade Cont., § 141. See also, Seitz v. Brewers, etc., Machine Co., 141 U. S. 510.

52—Naumberg v. Young, 44 N. J. L. 331; McMillan v. De Tamble, 93 Ill. App. 65; Conaut v. Nat. etc., Bank, 121 Ind. 323; Mast v. Pearce, 58 Ia. 579, 43 Am. Rep, 125, and note; Powell v. Edmunds, 12 East 6, 10; McCray R. & C. S. Co. v. Woods, 99 Mich. 269; Thompson v. Libby, 34 Minn. 374.

53—Corbett v. Underwood, 83 Ill. 324; Howe v. Hardy, 106 Mass. 329; Robertson v. Nat. S. S. Co., 139 N. Y. 416.

54—Gilbert v. McGinnis, 114 Ill. 28; Lonergan v. Courtney, 75 Ill. 580; Benson v. Gray, 154 Mass. 391; Detroit Advertiser v. Detroit, 43 Mich. 116.

55—Walters v. Senf, 115 Mo. 524; Sohn v. Jervis, 101 Ind. 578; Kuppitz, etc., Brewing Co. v. Behm, 130 Mich. 649.

56—Anderson v. Whittaker, 97 Ala. 690; Haskins v. Warren, 115 Mass. 514.

monly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding; evidence, therefore, of such incidents is receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten."[57]

§ 14. **Receipts versus releases.**—The Parol Evidence Rule is applicable to releases, but not to receipts. A release is an extinguishment of a preexisting right; whereas a receipt is merely an admission which raises a presumption which may be rebutted. As stated by Chief Justice Tenterden, "A receipt is an admission only, and the general rule is that an admission, though evidence against the person who made it and those claiming under him, is not conclusive evidence (except as to the person who may have been induced by it to alter his condition). A receipt, therefore, may be contradicted or explained."[58] And as stated by Justice Cowen, "A release cannot be contradicted or explained by parol, because it extinguishes a preexisting right. But no receipt can have the effect of destroying *per se* any subsisting right; it is only evidence of a fact. The payment of the money discharges or extinguishes the debt; a receipt for the payment does not extinguish the debt; it is only evidence that it has been paid. Not so of a written release; it is not only evidence of the extinguishment, but it *is* the extinguisher itself."[59]

§ 15. **To show a deed absolute on its face is a mortgage.**—In equity, it is universally held that parol evidence is admissible to show that a deed absolute on its face is in fact a mortgage. The chief reason assigned for this rule is to prevent fraud. As said by Justice O'Brien, "The rule which excludes evidence of parol negotiations or conditions, when offered to contradict or substantially vary the legal import of a written agreement, does not prevent a party to the agreement, in an action between the parties, from showing, by way of defense, the ex-

57—Brown v. Byrne, 3 E. & B. 703.

58—Graves v. Key, 3 B. & Ad. 313.

59—McCrea v. Purmort, 16 Wend. (N. Y.) 460, 473.

60—Helberg v. Schumann, 150 Ill. 12, 21; Winters v. Earl, 52 N. J. E. 52.

istence of a contemporaneous oral agreement, made at the time the writing was executed and delivered, which would render the use of the written instrument, for any purpose contrary to or inconsistent with the oral stipulation, dishonest or fraudulent."[61] Some courts, however, treat the agreement for the *defeasance* as part of the *consideration*. Thus Justice Sherwood says, "The doctrine that a deed absolute on its face may be shown to be a mortgage is old and well established. * * * The agreement for the defeasance, whether written or unwritten, is no more than one of the conditions upon which the deed was given, and, therefore, constitutes a part of the consideration for the conveyance; and I have never been able to discover why it was not competent to show it by parol in any case, either at law or in equity, where it was competent to show the actual consideration for the conveyance."[62] Upon principle, such evidence is admissible in actions at law, as well as in suits in equity, where the title to the property is not directly in issue. As said by Justice Wilkin, "If, as at common law, a deed absolute in form could only be held a mortgage upon the ground of accident, fraud or mistake, there would be much reason for holding, as is done by other courts, that the fact could only be proven in a court of equity, where such matters are cognizable; but our statute permits a deed absolute in form to be held a mortgage upon another and different ground from that of fraud, accident or mistake, namely: the intention of the parties that it shall be merely a security. No good reason can be shown for holding that intention may not be proved in an action at law, where the title is not directly in issue."[63] There is much confusion in the cases owing to the fact that insufficient care is exercised in giving consideration to the *object* the parties had in view in executing and delivering the instrument. The act of *transferring the title,* and the user of the property transferred, are distinct legal ideas. Parol evidence is inadmissible to vary or contradict the former, but such evidence is admissible to explain the latter. As said by

61—Baird v. Baird, 145 N. Y. 659, 663.

62—McMillan v. Bissell, 63 Mich. 66, 69, 70.

63—German Ins. Co. v. Gibe, 162 Ill. 251, 256.

Justice Field, "The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face."[64]

§ 16. **Consideration.**—Extrinsic evidence is admissible to show want or failure of consideration, and usually to contradict a recital of the consideration.[65] In the latter case the recital is treated as a mere acknowledgment or receipt which may be disputed. Where, however, the statement of the consideration constitutes an operative part of a contractual act, parol evidence is inadmissible to contradict it. And whether the consideration constitutes part of a contractual act or not is a question for the court to determine. As stated by Justice Baker, in a recent case, "After this contract has been proved and introduced in evidence, it was purely a matter of law for the court to determine whether the consideration from appellant to appellee was contractual or not. If the instrument stated a contractual consideration, parol evidence was not admissible to vary or contradict the consideration expressed; but if the consideration was expressed merely as a recital of a precedent or contemporaneous fact, parol evidence was receivable to prove that the recited fact was untrue, that the recited consideration was not paid at all or was paid on a different account."[67] Thus, in an action against a railway company for

64—Peugh v. Davis, 96 U. S. 332, 336. See also, Brick v. Brick, 98 U. S. 514. (In this case parol evidence was held admissible to show that an absolute transfer of shares of stock was a pledge).

65—Howell v. Moores, 127 Ill. 67; Goodspeed v. Fuller, 46 Me. 141, 71 Am. Dec. 572; Cardinal v. Hadley, 158 Mass. 352, 33 N. E. R. 575, 35 Am. St. Rep. 492; Hays v Peck, 107 Ind. 389.

66—McCrea v. Purmort, 16 Wend. (N. Y.) 460, 467 (citing English and American decisions and summing them up); Baird v. Baird, 145 N. Y. 659, 40 N. E. R. 222.

67—Indianapolis, etc., Ry. Co. v. Houlihan, 157 Ind. 494, 60 N. E. R. 943 (distinguishing Stewart v. Chicago, 141 Ind. 55, 40 N. E. R. 67).

personal injuries the defendant pleaded and introduced in evidence a written contract releasing it from liability in consideration of its agreement to pay certain expenses of the plaintiff, and of a sum of money recited as having been paid; and the court held that the consideration stated was contractual, and that under a reply of no consideration parol evidence was not admissible to contradict or vary the consideration expressed.[68]

§ 17. **Dates.**—Since the date of an instrument is not regarded as an operative part of a contractual act, but as a merely formal part of the instrument, parol evidence is admissible to show the true date of its execution and delivery, not only where the instrument contains no date, but also where the date given is incorrect.[69]

§ 18. **Meaning of phrases, words and abbreviations.**—Parol evidence is not admissible to explain phrases, words and abbreviations which have a common meaning and which are intelligible in the connections in which they are used. Such evidence, however, is admissible to explain expressions which have an ambiguous meaning, or which are rendered unintelligible or ambiguous owing to the connections in which they are used. Thus, parol evidence has been held admissible to explain such expressions as 'barrels';[70] 'current funds';[71] 'thousand';[72] 'horse chains';[73] 'hard pan,'[74] and the like.[75]

§ 19. **To identify parties or subject-matter.**—Parol evidence is admissible to identify the parties to a document, or to identify its subject-matter. Thus, such evidence has been held admissible to identify the members of a firm;[76] to identify

68—Indianapolis, etc., Ry. Co. v. Houlihan, *supra.*

69—Abrams v. Pomeroy, 13 Ill. 133; Saunders v. Blythe, 112 Mo. 1, 20 S. W. R. 319; District of Columbia v. Camden Iron Works, 181 U. S. 461; Shaughnessey v. Lewis, 130 Mass. 355; Ordeman v. Lawson, 49 Md. 135.

70—Miller v. Stevens, 100 Mass. 518, 97 Am. Dec. 123.

71—Huse v. Hamblin, 29 Ia. 501; *contra:* Marine Bank v. Birney, 28 Ill. 90, 92.

72—Smith v. Wilson, 3 B. & Adol. 728.

73—Swett v. Shumway, 102 Mass. 365, 3 Am. Rep. 471.

74—Blair v. Corby, 37 Mo. 313.

75—See notes, 6 Am. Rep. 678, 682; 6 L. R. A. 36. Also Whitney v. Boardman, 118 Mass. 242; Janesville Cotton Mills v. Ford, 82 Wis. 416; Grant v. Maddox, 15 M. & W. 737.

76—Sullivan v. Visconti, 68 N. J. E. 542, 53 Atl. Rep. 598; Lindsay v. Hoke, 21 Ala. 542. See

legatees and devisees; [77] and, in proper cases, to identify the property covered by a mortgage, and the debt secured by it. But parol evidence is not admissible to contradict a description of property which is complete.[79]

§ 20. **To aid interpretation.**—"Parol evidence is admissible, in the construction of contracts, to define the nature and qualities of the subject-matter, the situation and relations of the parties, and all the circumstances, in order that the court may put themselves in the place of the parties, see how the terms of the instrument affect the subject-matter, and ascertain the signification which ought to be given to any phrase or term in the contract which is ambiguous or susceptible of more than one interpretation; and this, although the result of the evidence may be to contradict the usual meaning of terms and phrases used in the contract; but if the words are clear and unambiguous, a contrary intention may not be derived from the circumstances."[80] Thus, in the following bequests, "I give and bequeath to my son William the sum of *i. x. x.* To my son Robert Charles the sum of *o. x. x.*," etc., parol evidence is admissible to show the meaning of the letters *i. x. x.* and *o. x. x.*[81] The testator's *habit* of using these letters to mean certain values is an extrinsic fact which is admissible to aid the court in interpreting the testator's *expressed* intention. It is to be observed, however, that if the testator had not been in the habit of using these letters to mean certain values, but had merely told a party that he meant them to stand for certain values, such parol evidence would be inadmissible. As stated by Baron Parke, "no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument or before or after that time, is admissible; the duty of the court being to declare the mean-

also, Clark v. Houghton, 12 Gray (Mass.) 38; Williams v. Gillies, 75 N. Y. 197.

77—Gaston's Estate, 188 Pa. St. 374, 41 Atl. Rep. 529, 68 Am. St. Rep. 874 and note. See also, extended note in 50 Am. St. Rep. 285.

78—Galen v. Brown, 22 N. Y. 37; Weber v. Illing, 66 Wis. 79; Payson v. Lamson, 134 Mass. 593, 45 Am. Rep. 348, 351.

79—Kurtz v. Hibner, 55 Ill. 514, 8 Am. Rep. 669, and note.

80—Brown's Parol Evid., 179, § 53.

81—Kell v. Charmer, 23 Beav. 195.

ing of what is written in the instrument, not of what was intended to have been written."[82] The distinction between explanatory evidence and evidence of intention, though a very important one, is frequently overlooked.[83] Greenleaf says, "The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the courts in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used."[84] Taylor says, "Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter. With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument."[85]

§ 21. **An excessive description not inherently fatal.**—It sometimes happens that the subject-matter of a document, after being correctly and completely described, is given a superadded and incorrect description. In such cases the latter description may be rejected as surplusage. As said by Chief Justice Caton, "If I give a bill of sale of my black horses, and describe them as being now in my barn, I shall not avoid it by showing that the horses were in the pasture or on the road. The description of the horses being sufficient to enable witnesses acquainted with my stock to identify them, the locality specified would be rejected as surplusage. Nor is this rule confined to personal property. It is equally applicable to real estate. If I sell an estate, and describe it as my dwelling house in which I now reside, situate in the city of Ottawa, I shall not avoid the deed by showing that my residence was

82—Shore v. Wilson, 9 Cl. & F. 555.

83—Thayer's Prelim. Treat. on Evid. 444, 479-482.

84—1 Greenl. on Evid. § 277.

85—Taylor on Evid., § 1082.

outside the city limits. So if a deed describe lands by its correct numbers, and further describe it as being situated in a wrong county, the latter is rejected. The rule is, that where there are two descriptions in a deed, the one, as it were, superadded to the other, and one description being complete and sufficient of itself, and the other, which is subordinate and superadded, is incorrect, the incorrect description, or feature or circumstance of the description, is rejected as surplusage, and the complete and correct description is allowed to stand alone."[86] Lord Bacon says, "There be three degrees of certainty—presence, name and demonstration or reference—whereof the presence, the law holdeth of greatest dignity; the name in the second degree, and the demonstration or reference in the lowest; and always error or falsity in the less worthy shall not control nor frustrate sufficient certainty and verity in the more worthy."[87] Thus, the maxim applicable in such cases is *Falsa demonstratis non nocet.*

§ 22. **To rebut or support an equity.**—Cases arise in which parol evidence is admissible to 'rebut an equity.' That is, parol evidence is admissible to rebut a disputable presumption of law raised by principles of equity against the apparent intention of the parties as expressed in a document. As stated by Lord Bacon, "Also to oust an implication, and rebut an equity, parol evidence has been admitted to explain the intention of the testator; as where a man devises particular legacies to his executors and makes no disposition of the surplus of his estate; in this case, according to the notions of the courts of

86—Myers v. Ladd, 26 Ill. 415, 417.

87—Bacon's Maxims of the Law, XXIV. (Works, Spedding's ed., Vol. XIV., p. 267). The maxim stated in the text is applicable not only to wills and deeds but also to contracts. See New York Life Ins. Co. v. Aitkin, 125 N. Y. 661. For further illustrations of the principle see Wiseman v. Green, 127 N. C. 288, 37 S. E. R. 272 ('west' read 'east'); Silliman v. Whitmer, 196 Pa. St. 363, 46 Atl. R. 489 (deed erroneous as to county, admitted); Scates v. Henderson, 44 S. C. 548, 22 S. E. R. 724 (boundary of one side of lot incorrectly described; incorrect description rejected as surplusage); Donehoo v. Johnson, 113 Ala. 126, 21 So. R. 70, 24 So. R. 888 (In this case the court improperly rejected the principle. The word "northwest" had by mistake been inserted instead of "northeast").

equity, the executors shall be only trustees for the next of kin; but to rebut this equity, which arises by implication only, the executors have been allowed to prove by parol evidence that the testator designed them the surplus."[88] And as stated by Greenleaf, "In certain cases of presumptions of law, also, parol evidence is admitted in equity to rebut them. But here a distinction is to be observed between those presumptions which constitute the settled rules of construction of instruments, or in other words, conclusive presumptions, where the construction is in favor of the instrument, by giving to the language its plain and literal effect, and those presumptions which are raised against the instrument, imputing to the language, *prima facie*, a meaning different from its literal import. In the latter class of cases parol evidence is admissible to rebut the presumption and give full effect to the language of the instrument, but in the former class, where the law conclusively determines the construction, parol evidence is not admissible to contradict or avoid it."[89] It is to be observed, therefore, that parol evidence is admissible to rebut a *disputable* presumption of law, but not a *conclusive* one. Thus, where two legacies, of like terms and motives, are bequeathed to the same party by the same testator, in different instruments, a disputable presumption of law is raised that the legacies are not cumulative; and parol evidence is admissible to rebut this presumption. The effect of the parol evidence in such a case is not to show that the testator did not mean what the will states, but rather to show that he did mean what it states. As said by Vice-Chancellor Plumer, in an English case.[90] "In some cases, courts of equity raise a presumption against the apparent intention of a testamentary instrument, and there they will receive evidence to repel that presumption; for the effect of such testimony is not to show that the testator did not mean what he has said, but, on the contrary, to prove that he did mean what he has expressed. Thus, where the court raises the presumption against the intention of a double gift, by reason that the sums and motives are the same in both in-

88—2 Bacon's Abr. (1st ed. 1736) 309.

89—3 Greenleaf on Evid. § 366.

90—Hurst v. Beach, 5 Madd. 351 (1821).

struments, it will receive evidence that the testator actually intended the double gift he has expressed." It is to be observed, however, that, to render the parol evidence admissible, both the motive and the amount of the legacy in each case must be the same. If they differ in either respect the parol evidence is inadmissible, for the reason that in such a case no presumption is raised to be rebutted. Moreover, it is essential to the admissibility of the parol evidence that the motive in each case be *expressed,* as well as the amount. As said by Vice-Chancellor Plumer, in the case cited in foot-note 90, "Where a testator leaves two testamentary instruments, and in both has given a legacy *simpliciter* to the same person, the court, considering that he who has twice given, must, *prima facie,* be intended to mean two gifts, awards to the legatee both legacies; and it is indifferent whether the second legacy is of the same amount, or less, or larger, than the first. But if in such two instruments the legacies are not given *simpliciter,* but the motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum is given, the court considers these two coincidences as raising a presumption that the testator did not by the second instrument mean a second gift, but meant only a repetition of the former gift. The court raises this presumption only where the double coincidence occurs, of the same motive, and the same sum, in both instruments. It will not raise it, if in either instrument there be no motive, or a different motive, expressed, although the sums be the same; nor will it raise it, if the same motive be expressed in both instruments, and the sums be different." Again, not only is parol evidence admissible, in a proper case, to *rebut* an equity, but such evidence is also admissible, in a proper case, to *support* an equity. It is to be observed, however, that parol evidence is not admissible for the latter purpose unless such evidence has first been introduced to rebut the equity. The two reasons for this rule are, (1) Unless the presumption raised be rebutted, parol evidence to support it would be unnecessary; (2) Its effect, if any, would be to contradict the *language* of the document. As stated in an English case,[91] "The

91—Palmer v. Newell, 20 Beav. 32, 8 De G. M. & G. 74, 24 L. J. Ch. 424. See also Richards v. Humphreys, 15 Pick. (Mass.) 133, 139; Reynolds v. Robinson, 82 N. Y. 103, 107.

evidence on either side is admissible, not for the purpose of proving, in the first instance with what intent the writing was made, but simply with the view of ascertaining whether the presumption, which the law has raised, is well or ill-founded. But, in the absence of evidence to countervail the presumption, no parol evidence in support of it can be adduced. In the first place, such evidence would be unnecessary; and next, its effect, if it had any, would be to contradict the language of the instrument. If, therefore, the circumstances are on the face of the instrument such as to rebut the presumption drawn by the law, or if the court does not raise any presumption at all, parol evidence to fortify the presumption in the one case, or to create it in the other, will be alike inadmissible; because, in either event, the effect would be to contradict the apparent meaning of the writing."

§ 23. **To establish a resulting trust.**—Parol evidence is admissible to establish a resulting trust. A resulting trust is not created by the agreement of the parties, but by implication of law apart from the agreement. It springs from the *acts* of the parties and not from their contract.[92] As said by Justice Magruder, "When the two facts, to-wit: payment of the purchase money by one, and conveyance of the title thereby purchased to another, are found to exist, then the law so construes those two facts as to make them constitute a resulting trust, and, for this reason, such a trust is said to arise by operation of law. . . . Since the whole foundation of resulting trusts of this class is the ownership and payment of the purchase money by one when the title is taken in the name of another, it follows that such trusts may be established by parol evidence."[93] The parol evidence in such cases is not admitted to contradict the language of the contract, or its legal import; but to show that the party holding the legal title is a trustee of the property transferred. And where the legal title to real property, purchased in a partnership transaction, is taken in the name of one or more of the partners, a resulting trust is created in

92—1 Perry on Trusts, § 134; Donlin v. Bradley, 119 Ill. 142.

93—Van Buskirk v. Van Buskirk, 148 Ill. 8, 19. See also, Springer v. Kroeschell, 161 Ill. 358, 362.

favor of the firm, which may be established by parol evidence.[94]

§ 24. **To show alteration of a document.**—Parol evidence is admissible to show that a certain document has been altered. Such evidence is also admissible to show by whom, when and the purpose for which such alteration was made. In all such cases the Parol Evidence Rule has no application.[95]

§ 25. **To show fraud, duress and undue influence.**—Parol evidence is admissible to show fraud, duress and undue influence. The purpose of the parol evidence in such cases is not to contradict the terms of the document, but to show qualifying circumstances pertaining to the formation of it with the view of having it set aside. The courts generally allow a wide scope in admitting parol evidence in such cases.[96]

§ 26. **To show accident and mistake.**—Parol evidence is also admissible to show accident and mistake. Such evidence is frequently admitted in courts of equity where the object sought is the correction or reformation of a document where there has been a mutual mistake of fact in reducing the agreement to writing.[97]

§ 27. **To show illegality and incapacity.**—Parol evidence is always admissible to show illegality. Thus, such evidence is admissible to show that a written contract never had a legal existence, owing to the fact that it is against public policy, or expressly forbidden by law, or supported by an illegal consideration such as a gambling debt, or made in furtherance of an unlawful enterprise.[1] Parol evidence is also admissible to show incapacity to make a contract. Thus, such evidence is

94—Kringle v. Rhomberg, 120 Ia. 472, 478.

95—McNail v. Welch, 125 Ill. 623; Lee v. Butler, 167 Mass. 426; Richards v. Day, 137 N. Y. 183; Kranich v. Sherwood, 92 Mich. 397.

96—Razor v. Razor, 142 Ill. 375; Antle v. Sexton, 137 Ill. 419; Tyler v. Anderson, 106 Ind. 185; Chandler v. Von Roeder, 65 U. S. 224; Gilmor's Est., 154 Pa. St. 523; Smith's Will, 95 N. Y. 516, 523; Mackall v. Mackall, 135 U. S. 167; Snyder v. Free, 114 Mo. 360.

97—Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302; Griswold v. Hazard, 141 U. S. 260; Silbar v. Ryder, 63 Wis. 106.

1—Sherman v. Wilder, 106 Mass. 537; Ferguson v. Sutphen, 8 Ill. 547.

admissible to defeat an action on a written contract by showing insanity,[2] gross intoxication,[3] or infancy;[4] and in some cases by showing coverture.[5] The introduction of parol evidence for such purposes does not violate the Parol Evidence Rule.

§ 28. **To explain an ambiguity. To interpret an equivocation.**—Concerning few subjects is there more confusion in the decisions than exists in regard to the admissibility of parol evidence to explain an ambiguity. There is confusion as to what constitutes an ambiguity, and still more confusion as to the circumstances which must exist to justify admitting parol evidence to explain it. But, when properly understood, the subject is comparatively free from difficulty, and the rules applicable to it are few and simple.

§ 29. **Same. Lord Bacon's view.**—"There be two sorts of ambiguities of words; the one is ambiguitas patens and the other latens. Patens is that which appears to be ambiguous upon the deed or instrument; latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. Ambiguitas patens is never holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matters of averment, which is of inferior account in law; for that we were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed which the law appointeth shall not pass but by deed."[6] Based upon this view, it has very frequently been said that parol evidence is admissible to explain a latent ambiguity, but not to explain a patent one. This statement, however, is altogether too broad, and quite misleading. Parol evidence is

2—Deu v. Clark, 10 N. J. L. 258; Mitchell v. Kingman, 5 Pick. (Mass.) 431.

3—Prentice v. Achorn, 2 Paige Ch. (N. Y.) 30.

4—Van Vaikenburgh v. Rouk, 12 Johns. (N. Y.) 338.

5—Dale v. Roosevelt, 9 Cow. (N. Y.) 307.

6—Circa 1597, Sir Francis Bacon, Maxims, rule XXV. (Works, Spedding's ed., 1861, Vol. XIV., p. 273). See also, Bacon's Law Tracts, pp. 99, 100; Bacon's Max. Reg. 23, 25; Brown's Leg. Max. 608 *et seq.*

admissible to explain a patent ambiguity, except in the one case of declarations of intention.

§ 30. **Same. Chaplin's view.**—"To sum up, then, extrinsic evidence may be given to translate, or decipher, or to show the facts relating to the person claiming or the thing claimed, under the will. Next, where there is any ambiguity, that is any double meaning, it is either patent or latent. If patent, the underlying facts may be shown in order to put the judge, so to speak, into the atmosphere surrounding the testator. If, in the light of these facts the term used is sensible, it must be applied without any direct evidence of *intent;* if insensible, the provision must fail. If latent, then in all the cases the underlying facts may here also be shown. If in their light the meaning is sufficiently clear to satisfy the mind of the judge, it must be applied; if still insensible, the provision fails. Thus far the rules concerning latent and patent ambiguities are alike. In the one particular class of latent ambiguities known as equivocations, already described, further extrinsic evidence of intent is admitted. Thus, it appears that extrinsic evidence of the facts is admitted in all cases of both latent and patent ambiguities, while extrinsic direct evidence of intent is admissible in only one class of latent ambiguities. And this is all there is in the rule concerning latent and patent ambiguities."[7] The foregoing summing up is a correct and lucid exposition of the law upon this much-abused subject.

§ 31. **Same. Underhill's view.**—"In every case the court is entitled to be placed in possession of all the information which is available of the circumstances of the estate and family of the testator when he made his will, to the end that the court may be in his situation as nearly as may be, and may interpret and understand the will as he would if he were living. When the evidence of extrinsic circumstances is all in, it may appear that a description in the will which was intended by the testator to apply to one object or thing is applicable, with more or less certainty, to several objects or things. This is a case of latent ambiguity, and parol evidence is then received

7—Chaplin's Principles of the Law of Wills, as quoted in Browne's Parol Evid. 438.

to ascertain which person or thing was intended by the testator. Where the ambiguity is latent, it is created by evidence of extrinsic facts, and the same evidence is admissible to remove it. But such evidence is not direct evidence of intention, and if the rule in relation to the reception of parol evidence to solve latent ambiguities permitted the introduction of such evidence only, it would not require a separate discussion, as it would be synonymous with the rule that extrinsic facts are always admissible to explain the language of the will, regardless of the nature of the ambiguity, whether it be patent or latent. The principle goes much further than this. It is not to be confined to the admission of facts appertaining solely to the circumstances of the testator, and which merely tend to show the meaning of his words. Under it, evidence showing or suggesting a direct inference of intention as to the things or objects disposed of in the will, including the testator's declarations of intention uttered at the execution of the will, and, according to some of the cases, subsequently thereto, are received to assist the court in disposing of the latent ambiguity, by showing which of several persons or things answering to the description was intended by the testator. Hence, it will be seen that there may be, and usually is, an essential and radical difference between the evidence which raises or creates the latent ambiguity, i. e., proof of extrinsic circumstances of the case, and the evidence which removes it or explains it, and which may be declarations of the intention of the testator as well as evidence of circumstances."[8]

§ 32. **Declarations of intention. Equivocation.**—Declarations of intention, pertaining to the subject-matter of a document, are, with one exception, inadmissible. The one exception is the case of an equivocation. An equivocation is a term in a document, which, upon application to external objects, is found to fit two or more of them equally. In applying the exception, however, the courts do not agree. As said by Justice Brace, in a recent decision, "There is much conflict of judicial opinion on the subject. The cases are numerous and irreconcilable."[9]

8—2 Underhill on the Law of Wills, § 910.

9—Willard v. Darrah, 168 Mo. 660, 668 (1902).

§ 33. **Same. Schouler's view.**—"The two classes of cases, then, in which direct evidence *dehors* the will appears admissible to show the testator's intention, are these: (1) Where the person or thing, the object or subject of the disposition, is described in terms which are applicable indifferently to more than one person or thing. (2) Where the description of the person or thing is partly correct and partly incorrect, and the correct part leaves something equivocal. Or, perhaps, to take a broader view of the subject, extrinsic evidence of intention may be admitted whenever the instrument is insufficiently expressed or applied in terms so as to raise a doubt of the object or subject intended, and in order to give the disposition effect, that doubt must be cleared and the insufficiency supplied. On the other hand, such extraneous proof should be ruled out, whenever its tendency is to establish an intention different in essence from what the will expresses on its own face; for when admissible it is in aid of the testator's expressed intention, not against it."[10] The conflict of judicial opinion, stated by Justice Brace, and quoted in the section next preceding, pertains to the latter of these two classes of cases. As regards the former class, the decisions are entirely harmonious.

§ 34. **Same. Underhill's view.**—"It is not necessary in order that parol evidence may be received, that the description in the will shall apply precisely and in every respect to two or more persons or things. In some cases where the rule has been invoked, two persons of exactly the same name, or answering precisely the same description, have claimed. But the law requires only that the testamentary description shall apply to the several objects with legal certainty, so that the mind of the court is satisfied. The description, whether by name, locality or occupation, must be sufficient to fairly satisfy the court that the testator may have meant either of the several persons or things which are revealed by the extrinsic evidence. . . . Thus, if a benefit is claimed by several persons, all answering the description of the will in one or more material particulars, though none of them answers to it perfectly and accurately in every particular, extrinsic evidence is received, including expressions of intentions."[11]

10—Schouler on Wills (3rd ed.) § 576.

11—2 Underhill on the Law of Wills, § 910.

§ 35. **The much-considered case of Miller v. Travers.**—In the much-considered case of Miller v. Travers,[12] Chief Justice Tindal recognizes two separate classes of latent ambiguities. In describing these classes he says, "The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator it is found that there are more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will. As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale; or where a man devises to his son John, and he has two sons of that name. In each of these cases respectively parol evidence is admissible to show which manor was intended to pass and which son was intended to take. The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular. As where an estate is devised called A., and is described as in the occupation of B., and it is found, that though there is an estate called A., yet the whole is not in B's occupation; or where an estate is devised to a person whose surname or Christian name is mistaken; or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence."

§ 36. **The paradoxical case of Doe v. Hiscocks.**—The case of Doe v. Hiscocks[13] was an action in ejectment, and the decision turned upon a devise to "my grandson John Hiscocks, eldest son of the said John Hiscocks." There were two sons,—Simon by the first wife, and John by the second wife. The description, therefore, did not exactly apply to either son; and the question was, whether declarations of intention of the testator were admissible to explain which son he meant. Lord Abinger excluded the declarations, and in doing so said: "Now,

12—8 Bing. 244 (1832). 13—5 M. & W. 363 (1839).

there is but one case in which it appears to us that this sort of evidence of intention (declarations of the testator) can properly be admitted, and that is, where the meaning of the testators words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. . . . But these cases (referring to several citations given) seem to us at variance with the decision in Miller v. Traverse, 8 Bing. 244; 1 M. & Scott, 342, which is a decision entitled to great weight. . . . We are prepared on this point (the point in judgment in the case of Miller v. Traverse, 8 Bing. 244; 1 M. & Scott, 342) to adhere to the authority of that case." It is to be observed, therefore, that Lord Abinger evidently believed that the decision in Doe v. Hiscocks was in harmony with the decision in Miller v. Travers. In point of fact, however, the decision in the former case overruled the second part of the rule laid down in the latter case.

§ 37. **Effect of Doe v. Hiscocks.**—The effect of Doe v. Hiscocks has been, (1) To limit the admissibility of declarations of intention made by a testator to the one class of cases,—"where the person or thing, the object or subject of the disposition, is described in terms which are applicable indifferently to more than one person or thing"; and (2) To exclude such declarations "where the description of the person or thing is partly correct and partly incorrect, and the correct part leaves something equivocal." In England, while it has met with some adverse criticism, it has been quite generally followed; and represents the law upon the subject in that country to-day.[14] In the United States, it has not met with so generous an approval; nor does it represent the American rule. While there is much confusion upon the subject in the American decisions, the weight of authority is against it, and in harmony with Miller v.

14—Chappell's Goods, Probate, . . . are probably not ad-
98 ("declarations of the testator missible").

Traverse.[15] In Illinois, the decision in Miller v. Traverse is fully approved.[16] As regards the text-book writers, some of them, including Professor Thayer, favor Doe v. Hiscocks, while others, including Prof. Wigmore, favor Miller v. Traverse.

§ 38. **Rule applicable to the legal import of a document.** —The Parol Evidence Rule is applicable not only to the express terms of a document, but also to its legal import.[17] Thus, in a written contract which is silent as to the time of its performance, the law implies that it is to be performed within a reasonable time; and parol evidence is inadmissible to contradict it.[18] It may be shown, however, by parol evidence what constitutes a reasonable time. Again, where a person is obligated in general terms in writing to pay another a sum of money, parol evidence is inadmissible to show that payment is to be made out of a particular fund.[19]

§ 39. **Rule not applicable to subsequent parol agreements.**— The Parol Evidence Rule is not applicable to a subsequent parol agreement where the original written agreement is not under seal. Parties to an executory bilateral contract may, at any time before a breach thereof, annul or vary it; and where the original contract is not under seal, the subsequent agreement may be oral or written. This is owing to the fact that an oral contract is not inferior in its nature to a written one not under seal. Both are simple contracts. It follows, therefore, that parol evidence is admissible to prove the subsequent contract. As stated by Mr. Freeman, "The rule forbidding the introduction of parol evidence to contradict, add to, or vary a writing, has no application to stipulations or agreements made between the parties subsequent to the execution of the written instrument. Agreements not by specialty, whether written or unwritten, are of the same grade and dignity in law, and are denominated simple contracts. Hence, it follows that to admit evidence of a subsequent parol agree-

15—Willard v. Darrah, 168 Mo. 660, 668.

16—Decker v. Decker, 121 Ill. 341, 12 N. E. R. 750.

17—Johnson v. Glover, 121 Ill. 283; Driver v. Ford, 90 Ill. 595.

18—Harrow Spring Co. v. Whipple Harrow Co., 90 Mich. 147, 30 Am. St. Rep. 421.

19—Mumford v. Tolman, 157 Ill. 258; Murchie v. Peck, 160 Ill. 175.

ment, for the purpose of showing an abandonment, discharge, or alteration of the terms of a previous written agreement not under seal, would not be to affect or dissolve the agreement by matter of an inferior nature. And, therefore, it is generally admitted that it is competent for the parties to an executory written contract not under seal, at any time before breach thereof, by a subsequent verbal agreement, founded on a sufficient consideration, either to waive altogether, or dissolve, or annul the previous written agreement, or in any manner to add to, subtract from, or vary or qualify the stipulations of such agreement, and thus to make a new or different contract, which may be proved by parol, whether it is a substitute for the old, or in addition to, or beyond it."[20]

§ 40. **Rule not applicable to strangers to the document.**— It remains to observe that the Parol Evidence Rule does not operate against strangers to the instrument, except where its enforcement is the gravamen of the action.[21] Even in an action between a stranger and one of the parties to the instrument it has no application.[22] But where a person, not a party to a document, bases his claim upon it, and seeks to make it serve him in an action against a party to it, he is estopped from contradicting it by parol evidence. Thus, where a person introduces in evidence a chattel mortgage to which he is not a party, and relies upon it to defeat his adversary, he has no more right to introduce parol evidence to vary or contradict its terms than he would have were he a party to the instrument.[23]

20—Note to Harris v. Murphy, 56 Am. St. Rep. 656, 662.

21—Northern Assur. Co. v. Chicago, etc., Assoc., 198 Ill. 474; Harts v. Emery, 184 Ill. 560; Hawkinson v. Vantine, 152 N. Y. 20.

22—Chicago, etc., Ry. Co. v. Beach, 29 Ill. App. 157.

23—Schultz v. Plankinton, 141 Ill. 116.

PART V.

WITNESSES.

CHAPTER I.

COMPETENCY.

§ 1. **Definitions.**—A witness, in the legal sense, is a person who appears before a court or judicial officer, is sworn or affirmed, and is then orally examined touching certain matters which are under judicial investigation. The term competency as applied to a witness, signifies his legal fitness to give evidence. Thus, a competent witness is a person who is legally qualified to testify in a cause. The term competent is also applicable to documents. As a general rule, the term witness is not applied to documents, but there are exceptions to this rule.[1]

§ 2. **Competency v. Credibility.**—The terms competency and credibility are not synonymous. A competent witness may testify and his evidence be wholly disbelieved; while, on the other hand, a perfectly credible witness may be utterly incompetent. The question of the competency of a witness is a preliminary question of fact for the court to determine; while the question of the credibility of a witness is a question for the jury to pass upon. When a person is called as a witness he is always presumed to be competent.

§ 3. **Persons disqualified at common law.**—At common law the following classes of persons were incompetent to testify: (1) Parties to the record; (2) Persons pecuniarly interested; (3) Persons mentally incompetent, or otherwise incapacitated; (4) Persons convicted of infamous crimes; (5) Persons who lacked in religious belief; (6) The husband or wife of a party to the suit, except where a crime was charged by one spouse against the other.

1—M'Chesney v. Lansing, 18 Johns. (N. Y.) 388.

§ 4. **Parties to the record.**—At common law, parties to the record were incompetent witnesses.[2] They could not testify in their own behalf, nor could they be compelled to testify against themselves. This rule was based upon the interest of the parties and the temptation to commit perjury. Where there were several co-suitors one could not become a witness for the adverse party without the consent of his associates; and where a party to the record was merely a nominal party he could not become a witness for the adverse party without the consent of the real party in interest. There were, however, a few recognized exceptions to this general rule. Thus, in an action against a common carrier or innkeeper for the loss of baggage the plaintiff was a competent witness to testify to the articles lost and their value, provided no other evidence was obtainable upon these points, and provided the liability of the bailee was first established by other evidence.[3] In equity, the rule was less rigid than at common law; but, as a general rule, it was enforced in equity as well as at common law.[4] By statutes generally, both in England and in this country, the rule excluding parties to the record from testifying has been abolished, except that in England it still obtains in criminal cases.[5]

§ 5. **Persons pecuniarly interested.**—Persons pecuniarly interested in the result of the suit, or in the record as an instrument of evidence, were incompetent witnesses at common law.

2—Marks v. Butler, 24 Ill. 568 (In this case Justice Walker says, "There is no question better settled than that a party to the record in a common law cause, is incompetent as a witness on the trial. The exceptions to this rule are rare and independent of statutory enactment, it is believed but few exist. The rule is so inflexibly established, that it is wholly unnecessary to refer to principles, or to adduce authorities in its support").

3—Parmelee v. McNulty, 19 Ill. 556; Ill. Cent. Ry. Co. v. Copeland, 24 Ill. 323; Adams Ex. Co. v. Haynes, 42 Ill. 90.

4—Mixell v. Lutz, 34 Ill. 382, 388 (In this case, Chief Justice Walker says, "The practice, however, in a court of chancery has never authorized the complainant to testify in his own behalf any more than at law").

5—Reg. v. Payne, L. R. 1 Crown Cas. 349, 355 (It is held in this case that one jointly indicted with others is incompetent to testify for or against his confederates where all are upon trial for the same offense). See also, Stephen's Dig. of Evid. art. 108.

To render witnesses disqualified, it was essential that the interest be a legal, certain, direct, present and vested one. A mere contingent, remote or social interest was not sufficient. Moreover, the witness must have appeared to be interested in favor of the party who called him.[6] If his interest preponderated against the party who called him he was competent to testify; and even where his interest in the party who called him was *not greater* than it was in the adverse party he was a competent witness. As said by Justice Treat, "It does not follow, because a witness is interested in the event of a suit that he is incompetent to testify. If his interest is favorable to the party calling him, he is incompetent; otherwise, where his interest is balanced, or adverse to the party who introduced him."[7] The degree of the interest was immaterial, provided it was real. Mere belief of the witness, however, that he was morally under obligation to testify on behalf of the party who called him, did not render him incompetent.[8] Nor did a mere circuity of interest disqualify him. Thus, where a witness was liable to a third party who was liable to the party who called him, the witness was not incompetent.[9] But, where a witness who, in the event of a judgment being rendered against the defendant, would be liable to her for nearly the amount of the judgment, the witness was held incompetent.[10] Mere declarations of a witness that he was materially interested in the result of a suit did not render him incompetent to testify. Nor did mere *expectation* of deriving some material advantage from the result disqualify him.[12] An interest that was doubtful or contingent affected the credibility of the witness in some cases but not his competency.[13] Greenleaf says, "The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or

6—Sims v. Givan, 2 Blackf. (Ind.) 461.

7—Stokes v. Kane, 4 Scam. (Ill.) 167. See also, Cadwell v. Meek, 17 Ill. 220; Kennedy v. Evans, 31 Ill. 258; Smalley v. Ellet, 136 Ill. 500.

8—Frink v. McClung, 9 Ill. 569.

9—Com. v. Allen, 30 Pa. St. 49.

10—Mason v. Jones, 36 Ill. 212.

11—George v. Stubbs, 26 Me. 243.

12—Coghill v. Boring, 15 Cal. 213.

13—Scull v. Mason, 43 Pa. St. 99; Cutter v. Fanning, 2 Ia. 580.

against him in some other action. It must be a present, certain and vested interest, and not an interest, uncertain, remote, or contingent."[14] Justice Taylor, in a comparatively recent case, says, "Under the common law the interest, in order to exclude a witness, must have been some legal, certain, and immediate interest, however minute, in the result of the cause, or in the record as an instrument of evidence. Where actual gain or loss would result simply and immediately from the verdict and judgment, the witness was deemed incompetent by reason of his interest; as, where he was a party, though but a nominal party, to the suit; or was a party in beneficial interest, or quasi a party, from having entered into a rule of court or agreement that another cause, to which he was a party, should abide the same result with that in which he proposed to give evidence. A witness was also incompetent by the common law where the record would, if his party succeeded, be evidence of some matter of fact to entitle him to a legal advantage, or repel a legal liability."[15] On the other hand, an interest in the question which did not involve an interest in the event of the suit did not disqualify the witness. As said by Justice Story, "It is perfectly clear, that a person having an interest only in the question, and not in the event of the suit, is a competent witness; and in general, the liability of a witness to a like action, or his standing in the same predicament, with the party sued, if the verdict cannot be given in evidence for or against him, is an interest in the question, and does not exclude him."[16]

Where a witness voluntarily acquired an interest in the event of a suit for the purpose of depriving the party who called him of the benefit of his testimony, he was not disqualified; but where the interest was acquired by operation of law he was.[17]

At the common law there were many classes of persons who were disqualified as witnesses on the ground of interest. Thus, a partner was incompetent to testify either for or against his

14—1 Greenleaf on Evid., § 390.

15—Adams v. Board of Trustees, 37 Fla. 266, 20 So. Rep. 266 (1896).

16—Evans v. Eaton, 20 U. S. 355, 423.

17—Jones v. Hoskins, 18 Ala. 489.

copartner in a partnership transaction.[18] Even a dormant partner was disqualified.[19] But where a partner had assigned his interest and been released from all liability by the other members of the firm, he was a competent witness to testify to a debt due the firm before his assignment and release.[20] A shareholder in a trading corporation was an incompetent witness in suits involving the corporate property.[21] But a sale and transfer of his stock restored his competency.[22] In an action on a bond against a surety, the principal was an incompetent witness.[23] A *cestui que trust* was not a competent witness for the trustee in an action involving the trust estate.[24] A bankrupt was not a competent witness where the effect of his testimony was to increase or diminish the estate.[25] Nor were the creditors of a bankrupt or an insolvent debtor competent witnesses where their testimony would have this effect.[26] As a general rule, an assignor was an incompetent witness.[26] As regards vendors and vendees generally, in some cases they were disqualified and in some cases not, depending upon the question of interest. In the case of a warranty, the vendor was incompetent if the suit involved his liability on his covenants of warranty;[27] but where the purpose of his testimony was to impeach the title warranted he was competent.[28] The drawer of a bill of exchange was an incompetent witness in an action against the acceptor.[29] In the case of negotiable instruments, however, the question of competency of the parties thereto, in actions on them, depended upon the circumstances of the particular case.[30] As regards non-nego-

18—Hurd v. Brown, 25 Ill. 504.

19—Wood v. Connell, 2 Whart. (Pa.) 542.

20—Hosack v. Rogers, 25 Wend. (N. Y.) 313.

21—Montgomery, etc., Co. v. Webb, 27 Ala. 618; Thrasher v. Pike Co. Ry. Co., 25 Ill. 393,

22—Ill. Mut. F. Ins. Co. v. Marseilles Mfg. Co., 6 Ill. 236.

23—Riddle v. Moss, 7 Cranch. (U. S.) 206.

24—Buchanan v. Buchanan, 46 Pa. St. 186; Bell v. Smith, 5 B. & C. 188.

25—Williams v. Williams, 6 M. & W. 170; Bridges v. Armour, 5 How. (U. S.) 91.

26—Clever v. Sodo, 3 C. & P. 10; Farrington v. Farrington, 4 Mass. 237.

27—Meek v. Walthall, 20 Ark. 648.

28—Robb v. Lefevre, 7 Ia. 150.

29—Barney v. Newcomb, 9 Cush. (Mass.) 46.

30—Hayes v. Gorham, 3 Ill.

tiable instruments, a party thereto was a competent witness to impeach its validity.[31]

§ 6. **The common law rule abolished.**—The rule at common law which rendered persons pecuniarily interested incompetent to testify has been practically abolished by statute, both in England and in this country. An exception to this very general change is the case of a witness, or the husband or wife of a witness, to a will, who is also a beneficiary under the will. Best says that this exception is the "sole survival of the numerous exclusionary rules making witnesses incompetent by reason of relationship or pecuniary interest."[32] The statutes very generally provide, however, that an interested person is incompetent to testify in an action against the executor or administrator of a deceased person, or the guardian or committee of an insane person concerning transactions with such person.[33]

§ 7. **Persons mentally incompetent, or otherwise incapacitated.**—Persons mentally incompetent, or otherwise incapacitated, are disqualified as witnesses. This rule has always obtained. Those included in this class are insane persons, idiots, infants of tender years and intoxicated persons.

§ 8. **Insane persons.**—An insane person is one who is laboring under a perverted or unbalanced mind. Such a person, however, is not necessarily an incompetent witness. Thus, an insane person who understands the nature of an oath, and is sane as to the facts concerning which he is called to testify, is a competent witness. Both of these features, however, are essential. As said by Justice Field, "The general rule, therefore, is that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the

429; Smith v. Walters, 23 Ill. 283; Curtis v. Marrs, 29 Ill. 508; Walters v. Witherill, 43 Ill. 388.

31—Brown v. Babcock, 3 Mass. 29.

32—Best on Evid. (Chamberlain Ed.) p. 178, note.

33—Sutherland v. Ross, 140 Pa. St. 379; Rev. St. U. S. § 858.

court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity."[34] This is also the English rule. As stated by Chief Justice Campbell, "The proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath? The lunatic may be examined himself that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is."[35] Wharton says, "It was once held that an idiot was inadmissible, and so of a lunatic. It is now settled, however, that in all cases, either an idiot or lunatic may be received, if, in the discretion of the court, he appears to have sufficient understanding to apprehend the obligation of an oath, and to be able to give a correct answer to the questions put. The competency is to be determined by the judge trying the case, upon the examination of the witness himself, or upon the testimony of third persons."[36] An idiot, however, in the strict sense, is never a competent witness. During lucid intervals a lunatic is a competent witness. The fact that he was insane at the time the transaction or event occurred does not render him incompetent. Peake says, "that all persons who are examined as witnesses must be fully possessed of their understanding; that is, such understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong; that, therefore, idiots and lunatics, *while under the influence of their malady,* not possessing their share of understanding, are excluded."[37] And Justice Bouldin says, "It will be seen then, that a witness is not excluded by this rule, merely because he *is* a lunatic. That is not enough *per se* to exclude him; but he must at the time of his examination be so under the influence of his malady as to be deprived of that 'share of understanding which is necessary to enable him to retain in memory the events of which he has been witness, and gives him a knowledge of

34—District of Columbia v. Arnes, 107 U. S. 519, 521, 522.

35—Reg. v. Hill, 5 Cox Cr. Cas. 259.

36—1 Wharton's Crim. Law, § 752.

37—Peake on Evidence; quoted and emphatically approved in Hartford v. Palmer, 16 Johns. (N. Y.) 143.

right and wrong.' If at the time of his examination he has this share of understanding, he is *competent*. That is the test of competency, and of such competency the court is the judge; while the weight of testimony—the credit to be attached to it—is left with the jury."[38] And Justice Story, in speaking for all the members of the United States Supreme Court, says, "a person being subject to fits of derangement is no objection either to his competency or credibility *if he is sane at the time of his giving his testimony.*"[39]

§ 9. **Idiots.**—An idiot is a person who has been without understanding from his birth, and who will always be in this condition. His infirmity is not mental perversion but mental deficiency. As said in a Maryland case, "Idiocy is that condition in which the human creature has never had, from birth, the least glimmering of reason, and is utterly destitute of all those intellectual faculties by which man, in general, is so eminently and peculiarly distinguished. It is not the condition of a deranged mind, but that of a total absence of mind. Hence, this state of fatuity can rarely or ever be mistaken by any, the most superficial observer. The medical profession seem to regard it as a natural defect, not as a disease in itself, or as the result of any disorder. In law it is also considered as a defect, and as a permanent and hopeless incapacity."[40] An insane person may have lucid intervals, but an idiot never can. Under no circumstances can an idiot, in the strict sense,

38—Coleman v. Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711.

39—Evans v. Hettick, 5 Wheat. (U. S.) 470. See also, Worthington v. Meuser, 96 Ala. 310, 11 So. Rep. 72 (In this case Justice Walker says, "The true reason for not admitting the testimony of a person *non* compos mentis in any case is because his malady involves such a want or impairment of faculty that events are not correctly impressed on his mind, or are not retained in his memory, or that he does not understand his responsibility as a witness. When the reason for the exclusion of the witness does not exist, he should be permitted to testify." And Justice Talfourd says, "It would be very disastrous if mere delusions were held to exclude a witness. Some of the greatest and wisest of mankind have had particular delusions.").

40—Owing's Case, 1 Bland Ch. (Md.) 372.

be sensible to the obligations of an oath; hence he can never be a competent witness.[41]

§ 10. **Deaf and dumb persons.**—Originally, deaf and dumb persons were presumed to be imbeciles, and, as such, incompetent witnesses. This presumption, however, was not conclusive. According to the modern rule no such presumption obtains. A deaf and dumb person is presumed a competent witness, and he may give his testimony by signs or by writing. The mode of communicating his testimony rests in the discretion of the court. The fact that he can write does not exclude communication by signs. As said by Justice Sherwood, "The presumption that a person deaf and dumb from birth should be deemed an idiot, does not seem to obtain in modern practice, at least in the United States. . . Such unfortunate persons may be witnesses, if able to communicate their ideas by signs through the medium of an interpreter, or by writing, if they write and read writing. And even if the witness can write, this does not prevent his testimony from being communicated by signs; either way may be adopted."[42]

§ 11. **Intoxicated persons.**—Intoxicated persons are not necessarily incompetent witnesses.[43] If, however, the degree of intoxication is so excessive as to render them incapable of testifying correctly, they will be excluded.[44] The competency of witnesses who are intoxicated rests in the sound discretion of the court. The fact that they were intoxicated at the time the fact in question occurred will not render them incompetent, but it may affect their credibility.[45] Habitual drunkenness does not render witnesses incompetent.[46] It may, however, affect their credibility. The rules governing the competency of witnesses who indulge in the use of opium and other stupifying drugs are similar to those which pertain to the competency of witnesses who indulge in intoxicating liquor.[47]

41—Coleman v. Com., *supra*.

42—The State v. Howard, 118 Mo. 127, 143, 144. See also, 5 Am. and Eng. Encyc. of Law, 119, and cases cited.

43—Eskridge v. State, 25 Ala. 33.

44—Hartford v. Palmer, 16 Johns. (N. Y.) 143.

45—State v. Costello, 62 Ia. 404, 17 N. W. R. 605.

46—Thayer v. Boyle, 30 Me. 475.

47—State v. White, 10 Wash. 611.

§ 12. **Infants of tender years.**—There is no precise age within which children are excluded as witnesses on the ground of insufficient intelligence. At the age of fourteen years every person is presumed to have common discretion and understanding. Under that age there is no presumption either way. The question of the competency of a child under fourteen years depends upon his intelligence and not his age. As said by Justice Walker, "It is also an elementary rule of evidence that intelligence, and not age, must govern in permitting persons of tender years to give testimony. The law has fixed no age at which they may or may not testify."[48] Wharton says, "Age, at least after four years are past, does not touch competency; and the question is one of intelligence, which, whenever a doubt arises, the court will determine to its own satisfaction by examining the infant on his knowledge of the obligation of an oath and the religious and secular penalties for perjury."[49] Justice Brewer says, "While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath."[50] Justice Newman says, "It seems to be the settled law that, after four years of age, a child is not incompetent to testify as a witness by reason of any rule of law which excludes him. Whether a child above that age is competent to testify depends upon his intelligence, which is to be determined by the trial court by examination of the child in court. The question is addressed to the discretion of the trial court. Its determination on such examination is final, except in a clear case of the abuse of its

48—Draper v. Draper, 68 Ill. 17, 19.

49—1 Wharton on Evid. (3d ed.) § 399.

50—Wheeler v. United States, 159 U. S. 523, 524 (boy between five and six held competent).

discretion.''[51] The intelligence essential to render a witness competent to testify does not mean his education or learning, but rather his knowledge as to the facts concerning which he is called upon to testify.[52] Children between five and six years of age have been held competent witnesses.[53] In determining the question of competency the preliminary examination of a child should be made in open court in the presence of the jury and counsel. The presiding judge may, however, examine him in private.[54]

§ 13. **Same. Cross-examination. Weight of testimony.**—The sympathies of the jury are usually with the child. For this reason his testimony is apt to be given more weight than it deserves. Again, the imagination of a child is, as a rule, proportionately great; and for this reason his testimony is apt to be overdrawn. The danger, therefore, is in giving his testimony too much weight rather than too little. In summing up this matter one very eminent writer says, "A child will have been taught to say that, if it tells a lie, it will go to the bad place when it dies (which is usually taken to show that it knows the meaning of an oath) long before it has any real notion of the practical importance of its evidence in a temporal point of view; and also long before it has learned to distinguish between its memory and its imagination, or to understand, in the least degree, what is meant by accuracy of expression. It is hardly possible to cross-examine a child, for the test is too rough for an immature mind. However gently the questions may be put, the witness grows confused and frightened, partly by the tax on its memory, partly by the strangeness of the scene; and the result is that its evidence goes to the jury practically unchecked, and has usually greater weight than it deserves, for the sympathies of the jury are always with it. This is a considerable evil, for in infancy the strength of the imagination is out of all proportion to the power of the other faculties; and children constantly say what is not true, not from de-

51—The State v. Juneau, 88 Wis. 180, 182.

52—Chicago City Ry. Co. v. Biederman, 102 Ill. App. 617.

53—Com. v. Robinson, 165 Mass. 426; Wheeler v. United States, *supra;* The State v. Juneau, *supra.*

54—McGuire v. People, 44 Mich. 286.

ceitfulness, but simply because they have come to think so, by talking or dreaming of what has passed. The evil, however, is one which the law cannot remedy. It would be a far greater evil to make children incompetent witnesses up to a certain age. The only remedy is that judges should insist to juries more strongly than they generally do on the unsatisfactory nature of the evidence of children, and on the danger of being led by sympathy to trust in it."[55]

§ 14. **Persons convicted of infamous crimes.**—At the common law, persons who had been convicted of infamous crimes were incompetent witnesses. Infamous crimes meant treason, felony and *crimen falsi*. Just what crimes were included in the last term is not very clear. Justice Boggs, in a recent case, says, "*Crimen falsi*, according to the better opinion, does not include all offenses which involve a charge of untruthfulness, but only such as injuriously affect the administration of justice, such as perjury, subornation of perjury, suppression of testimony by bribery or conspiracy to procure the absence of a witness, or to accuse one wrongfully of a crime, or barratry, or the like."[56] This disqualification, however, has been abolished by statutes; but the fact of conviction may still be shown for the purpose of impeaching the credibility of the witness.[57] At common law, the conviction could only be proved by offering the record of conviction and identifying the witness as the convicted person; but in some states, including Illinois, the conviction may be proved by oral evidence.[58]

§ 15. **Persons who lacked in religious belief.**—The theory of the common law was that the only guaranty of truthfulness was the oath. As a result of this theory, persons who felt no force in the oath, owing to lack of religious belief, were disqualified as witnesses. Lord Coke held that an infidel—meaning a person without belief in the Scriptures of the Old and New Testament—was an incompetent witness.[59] This view,

55—General View of the Criminal Law of England, by James Fitzjames Stephen.

56—Matzenbaugh v. The People, 194 Ill. 108, 113. See also, 1 Greenleaf on Evid. § 373; 16 Am. & Eng. Ency. of Law (2d ed.) 246, 247.

57—Gage v. Eddy, 167 Ill. 108.

58—Revised Statutes of Illinois, sec. 1, chap. 51. See also, Gage v. Eddy, *supra*.

59—7 Coke, 17b.

however, has been severely criticised and repudiated, both in England and in this country. Chief Justice Scates in criticising it says, "In early times Lord Coke laid down the rule as excluding all not Christians—a rule as narrow, bigoted and inhuman as the spirit of fanatical intolerance and persecution which disgraced his age and country."[60] In a leading English case,[61] it was settled that an infidel in general was a competent witness if he believed in a God and in a future state of rewards and punishments; but if he did not so believe he was incompetent. An atheist, therefore, was an incompetent witness. As said by Justice Wilde, "It would indeed seem absurd to administer to a witness an oath, containing a solemn appeal for the truth of his testimony, to a Being in whose existence he has no belief."[62] A person who had no religious belief, who did not acknowledge a Supreme Being, and who did not feel himself accountable to any moral punishment here or hereafter, but who merely acknowledged his amenability to the criminal law, was not a competent witness.[63] It was not essential, however, that a witness should believe in punishment hereafter to render him competent. It was sufficient if he believed in the existence of a God and future punishment here.[64] By constitutional provisions and by statutes, however, the common law rule has been very generally abolished, and the religious test of competency has largely passed away. The constitution of Illinois provides that "no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions";[65] and Justice Baker, in interpreting this provision, says, "We are of the opinion that the effect of this constitutional provision is to abrogate the rule which obtained in this state prior to the constitution of 1870, and that there is no longer any test or qualification in respect to religious opinion or belief, or want of the same, which affects the competency of citizens to testify as witnesses in courts of justice."[66]

60—The Cent. Mil. Tract Ry. Co. v. Rockafellow, 17 Ill. 541, 552.

61—Omichund v. Barker, 1 Atk. 21, and Willes 538.

62—Thurston v. Whitney, 2 Cush. (Mass.) 104.

63—Case cited in foot note 60.

64—Noble v. People, Breese (Ill.) 54.

65—Constitution of 1870, sec. 3, art. 2.

66—Hronek v. People, 134 Ill. 139, 152.

A witness was always presumed to have the necessary religious belief, and if denied, the burden of proof was upon the party who objected to the witness.[67]

Lack of religious belief could be shown by declarations of the witness. As said by Justice Wilde, "It has been argued, that this mode of proof was not admissible, the general rule of evidence being, that a witness shall not be permitted to disqualify himself by declarations not under oath, made out of court, as they might be untruly made for that purpose. But it has been frequently held, that this mode of proof is admissible, and is an exception to the general rule, from the necessity of the case; it being deemed unreasonable that the party objecting should be restricted to the testimony of the witness on the *voir dire*, as the objection supposes he has no regard to the sanction of an oath; and if so, his declarations under oath are of no more weight than those made seriously when not under oath. . . But notwithstanding these objections, which have some weight, it is well settled, that the avowal of a witness of his religious belief or disbelief may be proved like any other fact."[68]

§ 16. **Husband or wife of party to suit.**—At common law, the husband or wife of a party to a suit was an incompetent witness either for or against the other, except in a criminal action against one of them for personal injuries to the other.[69] They were also incompetent to testify to communications between each other, or to any fact or transaction, the knowledge of which was obtained by means of the marital relation.[70] This rule, with some modifications, still obtains. The fact that the wife's interest in the subject-matter of the suit is independent of her husband does not change the rule.[71] But where one spouse is merely a nominal party to the record the rule is held not to apply.[72] The rule is based upon interest and public policy. Chief Justice Tindal says, "A wife never can be ad-

67—Donnelly v. State, 26 N. J. L. 463.

68—Thurston v. Whitney, 56 Mass. 104, 108.

69—Hayes v. Parmalee, 79 Ill. 563; Seaton v. Kendall, 171 Ill. 410.

70—Pyle v. Onstatt, 92 Ill. 209.

71—Palmer v. Henderson, 20 Ind. 297.

72—Belk v. Cooper, 34 Ill. App. 649.

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mitted as a witness against her husband. She cannot be a witness for him, because her interest is precisely identical with his; nor against him, upon grounds of public policy, because the admission of such evidence would lead to dissension and unhappiness, and possibly to perjury."[73] Where a married woman is incompetent to testify on her own behalf, her husband is also incompetent. Thus, where the adverse party sues or defends as the executor of a deceased person, a husband is not a competent witness in behalf of his wife.[74] Where one spouse acts as the agent of the other, he or she is a competent witness. Where the cause of action grows out of the husband's neglect to furnish his spouse suitable support, the wife is competent to testify as to articles constituting necessaries.[75] In criminal prosecutions, neither spouse is a competent witness in behalf of the other. Stephen says, "In criminal cases the accused person and his or her wife or husband, and every person and the wife or husband of every person jointly indicted with him, and tried at the same time, is incompetent to testify. Provided that in any criminal proceedings against a husband or wife for any bodily injury or violence inflicted upon his or her wife or husband, such wife or husband is competent and compellable to testify."[76] It is to be observed, however, that in many states, by statute, in criminal cases the accused and their wives or husbands may testify, but cannot be compelled to do so.

Probably in all the states statutes exist which regulate the competency of spouses to act as witnesses. Generally speaking, however, the fundamental principles of the common law still remain. The Illinois statute provides as follows: "No husband or wife shall, by virtue of section 1 of this act, be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where

73—O'Connor v. Majoribanks, 4 Man. & G. 435.

74—Mann v. Forein, 166 Ill. 446.

75—Wilcoxon v. Read, 95 Ill. App. 33.

76—Stephen's Digest on Evid., art. 108.

the cause of action grows out of a personal wrong or injury done by one to the other or grows out of the neglect of the husband to furnish the wife with a suitable support; and except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce; and except also in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed, or in actions against carriers, so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions, where the transaction was had and conducted by such married woman as the agent of her husband in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under the provisions of this act: *Provided*, that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband or wife."[77]

§ 17. **Accomplices.**—An accomplice is not necessarily an incompetent witness. In fact, as a general rule, he is competent. Courts and authors generally sustain this view.[78] When called in behalf of the state, and his trial is severed from that of the other defendants, he is usually held competent.[79] When called in behalf of the other defendants, and he is separately indicted, some courts hold that he is competent,[80] while other courts hold the contrary.[81] Some courts recognize his competency even when jointly indicted with the other defendants, provided his trial is severed from theirs.[82] Chief Justice Peters says,

77—Revised Statutes of Illinois, chap. 51, § 5.

78—2 Russell on Crimes 957; 2 Starkie on Evid. 11; Roscoe on Crim. Evid. (9th ed.) 130; 1 Hale's Pleas of the Crown 305; Hawkins' Pleas of the Crown, Book 2, chap. 46, § 90; 1 Greenleaf on Evid., § 379; Wharton on Crim. Evid. (8th ed.) § 439.

79—State v. Stewart, 142 Mo. 412, 44 S. W. R. 240; Conway v. State, 118 Ind. 482, 21 N. E. R. 285; Lindsay v. People, 63 N. Y. 143.

80—State v. Unuble, 115 Mo. 452, 22 S. W. R. 378.

81—Com. v. Marsh, 10 Pick. (Mass.) 57; State v. Jones, 51 Me. 125, 126.

82—Marshall v. State, 8 Ind. 498.

"As a question simply at common law, although there is a contradiction in the cases, the preponderance of authority seems to favor the admission of a codefendant, not on trial, as a witness, if called by the prosecution. There is very much less authority allowing him to be sworn as a witness for the defence. Whether the distinction be a sensible one or not, it has prevailed extensively. . . Most of the authors on evidence evidently adopt the view that the testimony is admissible when offered by the State. Although but little authority is adduced to support their statements, and the doctrine is not very clearly or positively stated in some instances, still such a general concurrence of favorable expression has much weight upon the question. It goes far to show the common opinion and practice."[83] Justice Brewer says, "Referring to the English authorities, it has there been held that, at common law, and independently of any statute, when two persons jointly indicted are tried together, neither is a competent witness; but that if one is tried separately, the other is a competent witness against him, because as observed by Mr. Justice Blackburn, 'the witness was a party to the record, but had not been given in charge to the same jury.' "[84] Greenleaf says, "The usual course is, to leave out of the indictment those who are to be called as witnesses, but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in guilt."[85] And Wharton says, "An accomplice is a competent witness for the prosecution, although his expectation of pardon depends upon the defendant's conviction, and although he is a codefendant, provided in the latter case his trial is severed from that of the defendant against whom he is offered."[86]

§ 18. **Judicial officers.**—Upon the question of the competency of judges to act as witnesses in cases tried before them the decisions are conflicting. When a nobleman is upon trial

83—State v. Barrows, 76 Me. 401. See also, Noland v. The State, 19 Ohio 131; Noyes v. The State, 41 N. J. L. 418.

84—Benson v. United States, 146 U. S. 325, 334.

85—1 Greenleaf on Evid., § 379.

86—Wharton on Crim. Evid. (8th ed.) § 439.

before the House of Lords any of the peers is a competent witness;[87] and it has been held in England that where there is more than one presiding judge one of them may testify, but if he does so he must descend from the bench and not return during the trial.[88] Mr. Rapalje says, "If the judge sits alone, he cannot be sworn at all; and, if he be one of several judges, he ought not to be, unless he leaves the bench during the trial."[89] Justice Folger says, "the inclination of the courts has been to hold, that when it is necessary for the conduct of the trial that one should act as judge, he may not be called from the bench to be examined as a witness; but when his action as a judge is not required, because there is a sufficient court without him, he may become a witness, though it is then decent that he do not return to the bench."[90] Instances in which presiding judges have been called upon to testify are exceedingly rare; and, generally speaking, they may be said to be incompetent witnesses. If the rule were otherwise embarrassing conditions would arise. Thus, the judge would have to pass upon, the admissibility of his own testimony, the right to assert his privileges as a witness, overruling or sustaining motions to strike out his testimony, and the impeachment by other witnesses of his own testimony. Judges are not disqualified, however, when called as witnesses before other courts. They are competent witnesses in such cases to testify to facts which occurred at the trials where they were presiding.

§ 19. **Petit jurors.**—Originally, jurors were chosen from the neighborhood where the subject of litigation arose, because they were presumed to possess knowledge concerning it. According to the modern view, however, the less personal knowledge they have of the case the better. Jurors are required by their oaths to base their verdicts upon the evidence in the case; and if they have personal knowledge of material facts involved they must not give it any weight in reaching a verdict un-

87—Lord Stafford's Case, 7 How. St. Trials, 1384, 1458, 1552.

88—Sichel, Wit. 14.

89—Rapalje on Witnesses, § 45.

90—People v. Dohrig, 59 N. Y. 374, 379. See also, People v. Bennett, 49 N. Y. 137; Reg. v. Gazard, 8 C. & P. 595; Rogers v. State, 60 Ark. 6, 29 S. W. R. 894; an interesting foot note, 1 Campbell's Lives Ch. Jus. 166.

less such knowledge is given under oath upon the stand. There is no rule of the common law, however, which renders a petit juror incompetent as a witness in the cause in which he is empaneled.[91] Justice Bullard, in a case decided in 1840, says, "It is every day's practice to swear jurors to give evidence to their fellow jurors."[92] This comment, however, is not at all applicable to the rule of today. For a petit juror to serve as a witness in a cause in which he is empaneled is practically unheard of now. He has never been held a competent witness to impeach the verdict.[93]

§ 20. **Grand jurors.**—Grand jurors are competent witnesses to impeach the credibility of persons who have testified before them, and also where such persons are charged with having committed perjury before them. In the latter case, such grand jurors are competent witnesses either before a subsequent grand jury or before a petit jury after indictment.[94] Grand jurors are also competent witnesses to testify to admissions and confessions made before them.[95]

§ 21. **Arbitrators.**—Arbitrators are competent witnesses at the hearing before themselves.[96] But whether they can be compelled or not to testify is not well settled.[97] They are competent witnesses to sustain their award,[98] but not to impeach it,[99] except on the ground of fraud or mistake.[1] They are com-

91—Patterson v. Boston, 20 Pick. (Mass.) 159; Howser v. Com., 51 Pa. St. 332; Wharton v. State, 45 Tex. 2; Rex v. Rosser, 7 C. & P. 648; Heath's Case, 18 How. St. Tr. 132; Savannah, etc., Ry. Co. v. Quo., 103 Ga. 125; Fellow's Case, 5 Me. 333.

92—Rondeau v. New Orleans Imp. & Bank Co., 15 La. 160.

93—Am. & Eng. Ency. of Law, Vol. 29, p. 1008 *et seq.*

94—Gordon v. Com., 92 Pa. St. 216; Izer v. State, 77 Md. 110; People v. Young, 31 Cal. 563; United States v. Reed, 2 Blatchf. (U. S.) 435.

95—Hinshaw v. State, 147 Ind. 334; United States v. Porter, 2 Cranch (C. C.) 60; Kirk v. Garrett, 84 Md. 383.

96—Graham v. Graham, 9 Pa. St. 254, 49 Am. Dec. 557.

97—Ellis v. Saltan, cited in 4 C. & P. 327, note.

98—Strong v. Strong, 9 Cush. (Mass.) 560; Russell on Awards (6th ed.) 509; Valle v. N. M. Ry. Co., 37 Mo. 445.

99—Schmidt v. Glade, 126 Ill. 485; Doke v. James, 4 N. Y. 575.

1—Pulliam v. Pensoneau, 33 Ill. 375; King v. Jemison, 33 Ala. 499.

petent to testify to admissions made before them, when not confidential or made with the view of effecting a compromise.[2]

§ 22. **Attorneys.**—Attorneys who act as counsel in a cause are not disqualified as witnesses. If they testify, however, they should withdraw as counsel. Taylor says, "The judges at Nisi Prius were at one time inclined to regard as *incompetent to testify* all persons, whether counsel, attorneys or parties, who being engaged in a cause, had actually addressed the jury on behalf of that side on which they were afterwards called upon to give evidence. Further investigation of the subject, however, has led to a judicial acknowledgment that no such practice exists."[3] Justice Rogers says, "The furthest the court has yet gone is to discourage the practice of acting in the double capacity of attorney and witness, but there is nothing to prohibit an attorney from being a witness for his client when he does not address the jury. It is said, and I agree, that it is a highly indecent practice for an attorney to cross-examine witnesses, address the jury, and give evidence himself to contradict the witnesses. It is a practice which, as far as possible, should be discountenanced by courts and counsel."[4] And Justice Metcalf says, "The only question that has been argued in this case is, whether the plaintiff's attorney, who acted as counsel at the trial, was a competent witness for his client; and we know of no common law authority for excluding his testimony, besides the two very recent decisions in the English bail court, which were cited by the counsel for the defendants. (These two decisions were subsequently overruled.)[5] . . We cannot exclude a witness by reason of any views we may entertain respecting the policy of permitting him to testify. We can only administer the law as we find it to be. And by the common law, persons are competent witnesses, unless they are made incompetent by want of capacity, or of religious faith, by infamy, or by direct interest in the result of the cause. . . In most cases, counsel cannot testify for their clients without sub-

2—Cady v. Walker, 62 Mich. 157, 4 Am. St. Rep. 834.

3—Taylor on Evid. (4th ed.), Vol. II., § 1240.

4—Frear v. Drinker 8 Barr, 521.

5—Chief Justice Read in Follansbee v. Walker, 72 Pa. St. 228, 231.

jecting themselves to just reprehension. But there may be cases in which they can do it, not only without dishonor, but in which it is their duty to do it. Such cases, however, are rare; and whenever they occur, they necessarily cause great pain to counsel of the right spirit."[6]

6—Potter v. Inhabitants of Ware, 55 Mass. 519, 523, 524; Bishop v. Hilliard, 227 Ill. 382 (1907).

CHAPTER II.

PRIVILEGED COMMUNICATIONS.

§ 1. **Definition.**—Privileged communications, as ordinarily understood, are communications made *bona fide* concerning a matter in which the party communicating has an interest, or with respect to which he has a duty, to a party having a corresponding interest or duty. Such communications are said to be privileged in the sense that the party making them is not civilly or criminally liable for so doing. In the law of evidence, privileged communications are communications whose disclosure upon the witness stand are not compellable.

§ 2. **The grounds and attributes of privileged communications.**—The grounds upon which privileged communications are based are public policy and necessity. Four fundamental conditions are essential to their existence. These four conditions, as stated by Professor Wigmore, are as follows: "(1) The communications must originate in a confidence that they will not be disclosed; (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) The *relation* must be one which in the opinion of the community ought to be seduously fostered; and (4) The *injury* that would inure to the relation by the disclosure of the communications must be greater than the *benefit* thereby gained for the correct disposal of litigation."[1]

§ 3. **Four classes of privileged communications.**—There are four general classes of privileged communications. These four classes are as follows: (1) Professional communications; (2) Political communications; (3) Judicial communications; and (4) Social communications.

1—Wigmore on Evid., Vol. IV., § 2285.

§ 4. **Professional communications.**—At the common law, there was only one class of professional communications privileged. This class comprised communications between attorneys and their clients. By statute, however, other classes have been added. These include communications between physicians and their patients, and communications between spiritual advisers and laymen.

§ 5. **Communications between attorneys and their clients.**—Communications between attorneys and their clients have always been privileged. The basis of this rule is public policy. The proper protection of rights and the due administration of justice demand its observance. As said by Chief Justice Shaw, "So numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed."[2]

This privilege of exemption is confined to attorneys when applied to as such and when acting in that capacity, and to those persons whose intervention is strictly essential to enable the client and attorney to communicate with each other. Such persons may include interpreters, clerks, etc. It does not extend to law students who may be studying in law offices, even though clients believe them to be attorneys.[3] Nor does it extend to justices of the peace, as such. The mere fact that an agent is an attorney does not render the communications between him and his principal privileged. The relation between the parties must be that of attorney and client.[4] Moreover,

2—Hatton v. Robinson, 31 Mass. 416, 422.

3—Barnes v. Harris, 61 Mass. 576.

4—Wilson v. Rastall, 4 T. R. 753 (In this case Justice Buller says, "The privilege is confined to the case of counsel, solicitor and attorney, and it must be proved that the information was com-

the purpose of the communication must be to elicit legal advice. Where the function performed by an attorney is merely that of a conveyancer,[5] or notary,[6] there is no exemption. It is not essential, however, that a fee be paid, or even contemplated;[7] nor that a suit be commenced, or even contemplated.[8] But the fact that a retainer has been paid is not privileged. In Illinois it has been held that where a fee is not contemplated the communication is not privileged;[9] but this is not the general rule. Third persons who overhear the communications are not privileged.[10] Nor does the rule apply where the purpose of the communications is illegal.[11] Communications made by the attorney to the client are privileged as well as those made by the client to the attorney.[12]

The privilege exists for the benefit of the client and not for the benefit of the attorney. Hence, only the client, or someone who stands in his place, can waive it. Greenleaf says, "The protection given by the law to such communications does not cease with the termination of the suit, or other litigation or business, in which they were made; nor is it affected by the party's ceasing to employ the attorney and retaining another; nor by any other change of relations between them; nor by the death of the client. The seal of the law, once fixed upon them, remains forever, unless removed by the party himself, in whose favor it was there placed."[13] In the case of testamentary dispositions, however, the reason for the rule is wanting; and the cases hold that the personal representative of a de-

municated to the witness, in one of those characters; for if he be employed merely as a steward, he may be examined"). See also, Hatton v. Robinson, *supra*.

5—Hatton v. Robinson, *supra;* De Wolf v. Strader, 26 Ill. 225, 79 Am. Dec. 371; Stallings v. Hullum, 79 Tex. 421, 15 S. W. R. 677.

6—Lukin v. Halderson, 24 Ind. App. 645, 57 N. E. R. 254.

7—King v. Barrett, 11 Ohio St. 261; Beeson v. Beeson, 9 Pa. St. 279.

8—Alexander v. United States, 138 U. S. 353; Root v. Wright, 84 N. Y. 72.

9—De Wolf v. Strader, 26 Ill. 225.

10—People v. Buchanan, 145 N. Y. 1, 39 N. E. R. 846

11—Regina v. Cox, 6 Cr. L. Mag. 569, L. R. 14 Q. B. D. 153; State v. Kidd, 89 Ia. 56, 56 N. W. R. 263.

12—Bigles v. Rayher, 43 Ind. 112; Matter of Whitlock, 51 Hun (N. Y.) 351.

13—1 Greenleaf on Evid., § 237.

ceased client may exercise in favor of the client's estate the right to waive the privilege which the client had in his lifetime for his own benefit, and may call on the latter's attorney to disclose as a witness communications made to him by the client.[14] Some decisions which thus sustain the right of the personal representative of a deceased client to waive the privilege, erroneously hold that the privilege cannot be waived by an heir at law in a contest with devisees. Justice Ladd, in commenting upon these decisions, says, "These decisions are based on the ground that the executor or devisee represents the deceased, and the evidence is offered to sustain the will which it is the policy of the law to maintain. The particular vice in the reasoning in these cases, in making the distinction between the heir at law and the devisee, is the assumption that the paper in dispute is the will of the deceased. The statutes are for the benefit of the patient while living and of his estate when dead. The very purpose of the contest is to determine whether the deceased in fact made a will, who shall be his representative, and who is entitled to his estate. . . And no one can be said to represent the deceased in that contest, for he could only be interested in having the truth ascertained, and his estate can only be protected by establishing or defeating the instrument as the truth so ascertained may require."[15] An attorney may be compelled to testify to the identity of his client;[16] or to his handwriting.[17] Whether he may be compelled to disclose his client's address or not depends upon the circumstances of the particular case. If the client communicated it to him in professional confidence for the purpose of obtaining advice the communication is privileged; but if not, it is not privileged.[18] He may also be compelled to testify to the fact of his employment as attorney, and when the employment be-

14—Glover v. Patten, 165 U. S. 394; Brooks v. Holden, 175 Mass. 137, 55 N. E. R. 802; Scott v. Harris, 113 Ill. 447.

15—Winters v. Winters, 102 Ia. 51, 58 (In this case the communications were between physician and patient).

16—White v. State, 86 Ala. 69; Gower v. Emery, 18 Me. 79.

17—Foster v. Hall, 12 Pick. (Mass.) 89; White v. State, *supra.*

18—Alden v. Goddard, 73 Me. 345; Heath v. Crealock, L. R. 15 Eq. 257, 42 L. J. Ch. 455; *Ex parte* Campbell, L. R. 5 Ch. 703, 23 L. T. N. G. 289.

gan and ended.[19] He may not, however, disclose the nature of his client's cause, or the reason for his employment.[20] As an attesting witness to a will he is not privileged.[21] Upon this point all the decisions are harmonious. The same rule obtains where he is an attesting witness to a deed, or other document.[22] Pleadings which have been sworn to by a client, but which have not been filed, are privileged.[23]

§ 6. **Communications between physicians and their patients.** —At common law, communications between physicians and patients are not privileged.[24] In most jurisdictions, however, based upon considerations of public policy, statutes have been enacted which prohibit the disclosure of information acquired by physicians in their professional capacity, except in a few cases, unless the privilege be waived by the patients, or by persons representing them.[25] Under these statutes three conditions are essential. The party who interviews or examines the patient must be a physician in fact;[26] the relation of physician and patient must exist between them;[27] and the physician must act in a professional capacity at the time the communications are made.[28] Where, however, the relation is such that no confidence is reposed, the communications are not privileged.[29] The privilege does not extend to communications made to or by a druggist,[30] as such; nor to those made to or by a dentist;[31] nor to those made to or by a veterinary sur-

19—Shaughnessy v. Fogg, 15 La. Ann. 330.

20—Chirac v. Reinicker, 11 Wheat. (U. S.) 280.

21—Matter of Coleman, 111 N. Y. 220; Denning v. Butcher, 91 Ia. 425; McMaster v. Scriven, 85 Wis. 162, 39 Am. St. Rep. 828.

22—Hughes v. Boone, 102 N. C. 137; Robson v. Kemp, 5 Esp. 52.

23—Burnham v. Roberts, 70 Ill. 19.

24—Campau v. North, 39 Mich. 606, 33 Am. Rep. 433; Springer v. Byram, 137 Ind. 15, 45 Am. St. Rep. 159; Winters v. Winters, 102 Ia. 53, 63 Am. St. Rep. 428.

25—Con. Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250; Davis v. Sup. Lodge, etc., 165 N. Y 159.

26—Wiel v. Cowles, 45 Hun (N. Y.) 307.

27—People v. Koerner, 154 N. Y. 355, 48 N. E. R. 730.

28—Bower v. Bower, 142 Ind. 194, 41 N. E. R. 523.

29—Scripps v. Foster, 41 Mich. 742.

30—Brown v. Hannibal Ry. Co., 66 Mo. 588, 597.

31—People v. De France, 104 Mich. 563; 62 N. W. R. 709.

geon.[32] Not only are communications made by the patient to the physician privileged, but those made by other necessary parties, such as nurses, are privileged;[33] and those made by the physician are also privileged.[34] The mere presence of a physician does not render communications made to him privileged.[35] On the other hand, to render communications made by a patient privileged it is not essential that the physician be employed by him.[36] It has recently been held that communications may be privileged even where the physician treats the patient against his consent.[37] In this case Justice Vann says, "When one who is sick unto death is in fact treated by a physician as a patient even against his will, he becomes the patient of that physician by operation of law. The same is true of one who is unconscious and unable to speak for himself. If the deceased had been in a comatose state when the physician arrived, the existence of the professional relation could not be questioned. The relation of physician and patient, so far as the statute under consideration is concerned, springs from the fact of professional treatment, independent of the causes which led to such treatment. An examination made in order to prescribe establishes the same relation. . . The fact of treatment is the decisive test in this case." Where a physician is employed by a party, who is responsible for injuries to another, to examine the injured party merely with a view to a possible claim for damages, and with no view to professional treatment, the communications are not privileged.[38] But where the party responsible for the injuries employs the physician to treat the injured party the communications are privileged;[39] employment by the patient is not essential.[40]

32—Hendershot v. West. Union Tel. Co., 106 Ia. 529, 68 Am. St. Rep. 313.

33—Springer v. Byram, 137 Ind. 15, 45 Am. St. Rep. 159.

34—Keist v. Chicago, etc., Ry. Co., 110 Ia. 32, 81 N. W. R. 181; Edington v. Mut. Life Ins. Co. 67 N. Y. 185.

35—Sutcliffe v. Iowa State, etc., Ass'n, 119 Ia. 220, 93 N. W. R. 90.

36—Renihan v. Dennin, 103 N. Y. 573, 57 Am. Rep. 770.

37—Meyer v. Knights of Pythias, 178 N. Y. 63.

38—Heath v. Broadway, etc., Ry. Co., 57 N. Y. Superior Ct. 496; Weitz v. Mound City Ry. Co., 53 Mo. App. 39.

39—Weitz v. Mound City Ry. Co., *supra.*

40—Keist v. Chicago, etc., Ry. Co., *supra.*

Where a public prosecutor sends a physician to examine a woman upon whom an abortion has been committed, and she accepts professional treatment from him, the communications are privileged.[41] Where the purpose is to alleviate or cure, the statutes are applicable; but such a purpose is essential.[42] In all jurisdictions the statutes are given a liberal interpretation. The presumption is that all information given the physician is to aid him to prescribe.[43] But the party who claims the protection of the statute has the burden of showing facts which bring his case within it.[44] Where a physician makes visits which are in part professional and in part social, and he is unable to separate information acquired as a physician from that acquired as a friend, the communications are privileged.[45] In such a case, however, facts justifying the exclusion of the testimony must be shown. The mere statement of the physician that he cannot make the separation is not sufficient.[46] Where a prosecuting attorney sends a physician to examine the mental and physical condition of a prisoner, the communications are not privileged, unless the prisoner is led to believe that the purpose of the visit is professional treatment of which he stands in need.[47] Communications between physicians attending the same patient are privileged, provided that such communications pertain to his condition or treatment.[48] Physical defects or degrading marks on the patient may not be disclosed by the physician.[49] Nor may he disclose the nature of the ailment or disease of the patient.[50] Nor are his prescriptions admissible in evidence; or testimony, the purpose of

41—People v. Murphy, 110 N. Y. 128, 54 Am. Rep. 661.

42—*In re* Bruendle, 102 Wis. 45.

43—Feeney v. Long Id. Ry. Co., 116 N. Y. 375.

44—People v. Koerner, 154 N. Y. 355; Bowles v. Kansas City, 51 Mo. App. 416.

45—Matter of Darragh, 52 Hun (N. Y.) 591.

46—Gartside v. Connecticut Mut. Life Ins. Co., 76 Mo. 446, 43 Am. Rep. 765.

47—People v. Kemmler, 119 N. Y. 580; People v. Glover, 71 Mich. 303.

48—State v. Smith, 99 Ia. 26, 61 Am. St. Rep. 219.

49—Kling v. Kansas City, 27 Mo. App. 231.

50—Lammiman v. Detroit Citizens' St. Ry. Co., 112 Mich. 602; Sloan v. New York Cent. Ry. Co., 45 N. Y. 125; Nelson v. Nederland Life Ins. Co., 110 Ia. 600.

which is to explain their ingredients.[51] Nor is a physician a competent witness to testify to his patient's previous condition of health, where his knowledge of such is based upon observation and interviews during professional visits.[52] Nor is he competent as an expert witness to give an opinion based upon information acquired while acting in a professional capacity.[53] He may, however, testify as to an autopsy of the body of a person who had not been his patient.[54] And where he has attended a patient he may give expert testimony based upon a hypothetical question which does not involve information acquired by him while acting in a professional capacity.[55] The fact that the relation of physician and patient existed is not privileged; nor the fact that the physician attended the patient in a professional capacity; nor the fact of the number of professional visits made.[56] Communications made for an unlawful purpose are not privileged.[57] Such communications are governed by the same rule that obtains in the case of communications between attorney and client which are made for an unlawful purpose. In all cases, however, the presumption exists that they were made for a lawful purpose, and the party who asserts the contrary has the burden of showing that fact.[58] Where a physician is sued by his patient for malpractice he may testify to all matters pertaining to the treatment or operation upon which the action is based.[59]

§ 7. **Same. Waiver of the privilege.**—The privilege is for the benefit of the patient; and only he, or his personal representative, or his beneficiary, may waive it. The patient may waive it at any time.[60] After his death, it may be waived, as a gen-

51—Nelson v. Nederland Life Ins. Co., *supra.*

52—Barker v. Cunard Steamship Co., 91 Hun 495.

53—Thompson v. Ish, 99 Mo. 160, 17 Am. St. Rep. 552.

54—Harrison v. Sutter Ry. Co., 116 Cal. 156.

55—People v. Schuyler, 106 N. Y. 298.

56—Dittrich v. Detroit, 98 Mich. 245; Nelson v. Nederland Life Ins. Co., *supra.*

57—State v. Smith, 99 Ia. 26, 61 Am. St. Rep. 219.

58—Guptill v. Verback, 58 Ia. 98.

59—Cramer v. Hurt, 154 Mo. 112, 77 Am. St. Rep. 752; Warsaw v. Fisher, 24 Ind. App. 46.

60—Morris v. New York, etc., Ry. Co., 148 N. Y. 88, 51 Am. St. Rep. 675; Cramer v. Hurt, *supra; In re* Bruendl, 102 Wis. 45, 78 N. W. R. 16.

eral rule, by his personal representative.[61] In some jurisdictions it is held that it may be waived by the patient's attorney.[62] In an action on a life insurance policy by the beneficiary against the insurance company, the former may waive the privilege attaching to communications between the insured and his physician.[63] And in the probate of a will the proponents may waive the privilege of the testator as regards the testimony of his physician.[64] In the case of infant patients who are not *sui juris*, it has been held that the privilege accruing to them may be waived by their parents.[65] If the patient testifies to matters which are privileged, the privilege is waived;[66] and the same result follows where he calls the physician to testify to such matters.[67] But where there are two or more physicians, the patient in calling one of them to testify does not waive his privilege as to the other or others with respect to wholly distinct privileged matters.[68] And a waiver as to privileged matters which occurred at one time is not a waiver as to privileged matters which occurred at a different time.[69] The mere fact that the patient goes upon the stand to testify generally does not constitute a waiver of his privilege, nor does the fact that he calls the physician to the stand to testify generally constitute a waiver.[70]

§ 8. **Same. Exceptions to the general rule.**—In an action by a patient against his physician for malpractice the rule of privilege, as heretofore stated, has no application. In this class

61—Morris v. Morris, 119 Ind. 341; Holcomb v. Harris, 166 N. Y. 257.

62—Alberti v. New York, etc., Ry. Co., 118 N. Y. 77.

63—Penn. Mut. Life Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769.

64—Fraser v. Jennison, 42 Mich. 206.

65—State v. Depoister, 21 Nev. 107, 25 Pac. Rep. 1000 (In this case it is held that a waiver of the privilege may be implied).

66—Lane v. Boicourt, 128 Ind. 420, 25 Am. St. 442, 27 N. E. R. 1111; Highfill v. Missouri Pac. Ry. Co., 93 Mo. App. 219.

67—Holcomb v. Harris, 166 N. Y. 257, 59 N. E. R. 820; Thompson v. Ish, 99 Mo. 160, 17 Am. St. Rep. 552, and note, 12 S. W. R. 510.

68—Penn., etc., Ins. Co. v. Wiler, 100 Ind. 92.

69—Barker v. Steamship Co., 91 Hun, 495 (approved in 157 N. Y. 693).

70—McConnell v. Osage, 80 Ia. 293; Butler v. Manhattan Ry. Co., 143 N. Y. 630.

of cases the physician is at liberty to make full disclosures touching all matters pertaining to the treatment or operation upon which the action is based.[71] But in an action by a physician against his patient for the value of professional services rendered, the physician is prohibited from disclosing any matters which fall within the general rule.[72] Generally speaking, this rule of privilege is applicable to criminal, as well as civil, cases;[73] but where the purpose of introducing the testimony of a physician is to throw light upon the innocence or guilt of the prisoner, the rule does not apply.[74] The reason the rule does not apply in the latter case is, a higher public policy than that upon which the rule is based demands that it should not.

§ 9. **Communications between spiritual advisers and laymen.**—At common law, communications between spiritual advisers and laymen are not privileged.[75] In many jurisdictions, however, such communications are privileged by statute. It has been held that the privilege extends to replies by the clergyman as well as to statements made to him.[76] Usually, however, the privilege as regards clergymen is confined to confessions made to them in the course of discipline enjoined by the church.[77] The New York statute provides that, "A clergyman or other minister of any religion shall not be allowed to disclose a confession made to him in his professional character in the course of discipline enjoined by the rules of practice of the religious body to which he belongs."[78] Statements which are not of a confidential nature, and which are not made to a clergyman for the purpose of obtaining advice or assistance, are not privileged under the statutes.[79]

71—Cramer v. Hurt, 154 Mo. 112; Warsaw v. Fisher, 24 Ind. App. 46; Van Allen v. Gordon, 83 Hun, (N. Y.) 379.

72—Van Allen v. Gordon, *supra*.

73—People v. Murphy, 101 N. Y. 126, 54 Am. St. Rep. 661.

74—Hank v. State, 143 Ind. 238; People v. Lane, 101 Cal. 513; People v. Harris, 136 N. Y. 423.

75—Normanshaw v. Normanshaw, 69 L. T. N. S. 468; Wheeler v. Le Marchant, 17 Ch. Div. 675, 50 L. J. Ch. 793.

76—Gill v. Bouchard, 5 Quebec Q. B. D. 138.

77—Knight v. Lee, 80 Ind. 201; People v. Gates, 13 Wend. (N. Y.) 311.

78—C. C. P. 1877, § 833.

79—State v. Brown, 95 Ia. 381.

§ 10. **Same. Waiver of the privilege.**—The privilege is for the benefit of the penitent and not for the benefit of the spiritual adviser. Hence the former may waive it, but not the latter. Unless waived by the penitent it remains forever.[80]

§ 11. **Political communications. State secrets.**—Communications involving state secrets have always been regarded as privileged. The basis of the rule is public policy. This public policy manifests itself in two aspects. First, a disclosure of state documents might involve danger to the nation;[81] and secondly, it might result injuriously to servants of the state as individuals.[82] It is to be observed, however, that the rule of privilege which is applied to political communications is one which is fraught with very serious danger, inasmuch as it is open to gross abuse by being utilized for partisan and selfish ends, and, perhaps, at the expense of justice to innocent persons. "No nation," says the great American jurist, Edward Livingston, "ever yet found any inconvenience from too close an inspection into the conduct of its officers; but many have been brought to ruin, and reduced to slavery, by suffering gradual impositions and abuses which were inperceptible only because the means of publicity had not been secured."[83] Mr. Botts says, "I can never express, in terms sufficiently strong, the detestation and abhorrence which every American should feel towards a system of State secrecy. It never can conduce to public utility, though it may furnish pretexts to men in power to shelter themselves and their friends and agents from the just animadversion of the law, to direct their malignant plots to the destruction of other men while they are themselves secure from punishment."[84] And Professor Wigmore says, "The menace which this supposed privilege implies to individual liberty and private right will justify us in

80—Westover v. Ætna Life Ins. Co., 99 N. Y. 56.

81—Thompson v. German Val. Ry. Co., 22 N. J. Eq. 111.

82—Hennessy v. Wright, L. R. 21 Q. B. 509, 512 (1888).

83—Works of Edward Livingston, Vol. I., p. 15.

84—Aaron Burr's Trial, Robertson's Rep. Vol. II., p. 517. See also Justice Mondelet's severe criticism of the rule in Gugy v. Maguire, 13 Low. Can. 33, 38.

repudiating it before it is too solidly entrenched in precedent."[85]

Political communications comprise the following two classes: (1) Those which pertain to affairs of State; and (2) Those which pertain to the administration of penal justice.

§ 12. **Communications which pertain to affairs of state.**—In so far as a disclosure of official communications between officers of the state would be injurious to public interests such communications are privileged. This rule is applicable to official communications between the president of the United States and the members of his cabinet; to those between the governor of a state and the heads of departments of the state; and to those between heads of departments of a state and their subordinate officers. In all secret employment of the government in time of war, or in matters affecting our foreign relations, where the disclosure of service might embarrass or compromise the government in its public duty, or endanger the person or injure the character of such employee, testimony pertaining thereto is excluded.[86]

In England, no member of the House of Lords, or of the House of Commons, or officer of either House, can be compelled to disclose what takes place in secret sessions. This rule is also applicable to executive sessions of the Congress of the United States.

Upon the question who is to decide whether a disclosure of certain official communications would be injurious to the public or not, there are two views. One view is that the officer who has the communications in his possession is to decide it, and not the court; and that his decision is conclusive. The reason assigned for this view is that the court could come to no conclusion upon the matter without a judicial inquiry which must of necessity be public; and this preliminary examination would necessarily give to the communications that very publicity which public policy requires should be avoided.[87] The other view is that the question is one for the court to decide. The

85—Wigmore on Evid., Vol. IV., p. 3342.

86—Totten v. United States, 92 U S. 105; Hartranft's Appeal, 85 Pa. St. 433, 447.

87—Beaton v. Skene, 5 H. & N. 838, 853.

grounds of this view are: (1) It is an inherent function of the court to decide matters pertaining to the admissibility of evidence; and (2) A higher public policy obtains in its favor than obtains in favor of the former view. Of these two views it is submitted that, both upon principle and public policy the latter should be sustained. Upon principle it should be sustained because it is an inherent function of the court to decide upon all preliminary questions of fact upon which the admissibility of testimony rests. Upon the ground of public policy it should be sustained because to leave the determination of such questions to designing officials is to enable them to keep from public exposure their own wrongdoings, and perhaps at the expense of innocent individuals. As said by Professor Wigmore, "The truth cannot be escaped that a court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to designing officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it is to shield his wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the judge."[88]

§ 13. **Communications which pertain to the administration of penal justice.**—Communications which relate to the commission of crimes, made to the proper officials with a view to the prosecution or detection of suspected offenders, are privileged. Lord Chief Justice Eyre, in a celebrated English case, says, "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made should not unnecessarily be disclosed."[89] The basis of this rule of privilege is public policy. It is in the interest of the public that such information be not suppressed; and immunity from a compulsory disclos-

88—Wigmore on Evid., Vol. IV., p. 3345.

89—Hardy's Trial, 24 How. St. Tr. 8.

ure of the informant's identity is a strong incentive to furnish it. It is to be observed, however, that the rule is subject to certain limitations. The privilege is confined to the *identity* of the informant and does not extend to the contents of the information. It follows, therefore, that where the informer's identity is known and admitted no reason exists for the application of the rule. The information must be communicated to officers whose function is to prevent public wrongs and bring offenders to justice, and it must concern the wrongful acts of third persons. Moreover, the rule will not be applied where a higher public policy demands that it should not be. As said by Lord Esher, Master of the Rolls, "I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail."[90]

Under this rule a person who has been employed to collect information for the use of the government, or for the use of the police department, is a privileged witness; and he will not be allowed, as a general rule, to disclose any matters connected with such employment.[91] Where a person is prosecuted for larceny, the owner of the goods stolen may refuse to disclose the names of the parties who furnished him the information which induced him to proceed to have the guilty party indicted.[92] In an action for maliciously and falsely representing to the treasury department of the United States that the plaintiff was intending to defraud the revenue, the defendant cannot be compelled to answer interrogatories, filed by the plaintiff, inquiring whether he did not give or cause to be given to the department information of supposed or alleged frauds on the revenue contemplated by the plaintiff.[93] Lord Kenyon, in the earliest case upon the subject, says, "The

90—Marks v. Beyfus, L. R. 25 Q B. D. 494, 498.

91—Hardy's Trial, *supra*.

92—State v. Soper, 16 Me. 293; United States v. Moses, 4 Wash. C. C. 726.

93—Worthington v. Scribner, 109 U. S. 487.

defendant's counsel have no right, nor shall they be permitted to inquire the name of the person who gave the information of the smuggled goods."[94] And Justice Gray says, "All the English authorities agree that the rule has ever since been held in revenue cases to prevent a witness from answering questions that would disclose the informer, if a third person."[95] Nor is a witness required to answer on cross-examination whether he himself was the informer.[96] In an action for libel, by an army officer against the president of a military court of inquiry, neither their report to the commander-in-chief, nor an office copy of it, is admissible in evidence.[97] And in an action for slander, by one military officer against another, for speaking defamatory words of the military conduct of the plaintiff, the secretary of war may refuse to produce in evidence the minutes of a court of inquiry, and letters written to the war department by the plaintiff himself, on the ground that their production would be prejudicial to the public service.[98] Justice Gray, in summing up the matter, says, "It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of the state and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice, therefore, will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."[99]

94—Rex v. Akers, 6 Esp. 125.

95—Worthington v. Scribner, *supra.*

96—Attorney General v. Briant, 15 M. & W. 169.

97—Home v. Bentirick, 2 Brod. & Bing. 130.

98—Beatson v. Skene, *supra.*

99—Worthington v. Scribner, *supra.*

§ 14. **Judicial communications.**—Judicial communications which are privileged comprise the following four classes: (1) Deliberations of judges; (2) Deliberations of petit jurors; (3) Deliberations of grand jurors; and (4) Deliberations of arbitrators. The basis of the rule of privilege applicable to these four classes of communications is public policy.

§ 15. **Deliberations of judges.**—The deliberations of judges in determining their judgments, and the reasons for their conclusions, are privileged. They may also refuse to disclose upon the witness stand what witnesses have testified on trials before them.[1] They are at liberty, however, to waive their privilege if they choose to do so.[2] In an action on a forfeited recognizance bond, a former judge of the court, who directed the forfeiture to be entered, is a competent witness to establish the fact that the forfeiture was taken after the final adjournment of the court.[3] A justice of the peace who tried a cause is a competent witness to prove the grounds upon which it was decided.[4] And generally, where the issues are not clear, the trial judge is a competent witness, in a subsequent suit not tried before him, to testify as to the real matters in issue at the former trial.[5] And, in a proper case, his minutes of the proceedings before him have been held competent evidence.[6]

§ 16. **Deliberations of petit jurors.**—The deliberations of petit jurors, while engaged in seeking to reach a verdict, are also privileged. As said by Justice Morton, "The secrecy of the deliberations and discussions of the jury, and the exemption of jurors from the liability of being questioned as to their motives and grounds of action, are highly important to the freedom and independence of their decisions."[7] Jurors are competent witnesses to prove what evidence was given upon a trial in which they served; but they are not competent

1—Welcome v. Batchelder, 23 Me. 85.

2—Welcome v. Batchelder, *supra.*

3—The State v. Hindman, 159 Ind. 586.

4—Taylor v. Larkin, 12 Mo. 103, 49 Am. Dec. 119.

5—Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; Supples v. Cannon, 44 Conn. 424.

6—*Ex parte* Gillebrand, L. R. 10 Ch. 52.

7—Hannum v. Belchertown, 19 Pick. (Mass.) 311.

witnesses as to the elements of their verdict, nor as to the deliberations by which it was reached.[8] And Justice Gray says, "The proper evidence of the decision of the jury is the verdict returned by them upon oath and affirmed in open court; it is essential to the freedom and independence of their deliberations that their discussions in the jury room should be kept secret and inviolable."[9]

§ 17. **Same. Impeaching their verdict.**—Whether the affidavit of a juryman as to what was said or done in the jury room is admissible in evidence or not, is a question upon which the decisions are in conflict. Some hold that it is not admissible for any purpose. Some that it is admissible to support the verdict, but not to impeach it. While others hold that it is admissible under some circumstances to impeach it. The question most frequently arises on a motion to set aside a verdict and grant a new trial.

§ 18. **Same. The three principles involved.**—As pointed out by Professor Wigmore,[10] in determining whether a petit juror's affidavit is admissible or not, three general and independent principles are involved. These three principles are as follows: (1) The deliberations of a petit juror in the jury room are privileged and may not be disclosed without his consent; (2) The parol evidence rule is applicable to verdicts as well as to other classes of writings; and (3) A witness should not be allowed to give self-stultifying testimony.

§ 19. **Same. The first principle.**—On the ground of public policy freedom of expression in the jury room is absolutely essential. It follows, therefore, that the rule of privilege is applicable in the full sense of the term to the deliberations of petit jurors. This principle has always obtained.

§ 20. **Same. The second principle.**—This principle, in determining the question of the admissibility of a petit juror's testimony or affidavit as to what occurred in the jury room, is frequently overlooked. The principle, however, is an important one, and it should not be forgotten that it is applicable

8—Hewett v. Chapman, 49 Mich. 4.

9—Woodward v. Leavitt, 107 Mass. 453, 9 Am. Rep. 49, 51.

10—Wigmore on Evid., Vol. IV., § 2345.

to verdicts to the same extent as to other writings. Under this principle, the testimony or affidavit of a petit juror is not admissible to prove his consultations or motives which resulted finally in his written verdict. It is admissible, however, to prove the precise scope of the issues upon which the verdict was based; or to prove a mistake on the part of the foreman in declaring the verdict; or a mistake on the part of the clerk in recording it; or to show the invalidity of the verdict owing to the misconduct of the jurors in determining it.

§ 21. **Same. The third principle.**—This principle, as a rule of evidence, was recognized at an early day; but generally speaking, it was repudiated long ago, and the only vestige of it remaining is an occasional recognition of it in connection with the admissibility of the testimony or affidavits of petit jurors. As pointed out by Professor Wigmore, it would be well if it disappeared altogether.

§ 22. **Same. The early English rule.** Prior to Lord Mansfield's time the testimony or affidavit of a petit juror was admissible even to impeach his verdict. Chief Justice Holt says, "The jury were very shy of giving a reason of their verdict, thinking they have an absolute despotic power; but I did rectify that mistake, for the jury are to try causes with the assistance of the judges, and ought to give reasons when required, that if they go upon any mistake they may be set right."[11]

§ 23. **Same. Lord Mansfield's rule.**—Lord Mansfield, upon the theory of forbidding self-stultification, laid down the rule that a juror's testimony or affidavit was inadmissible to impeach his verdict. In rejecting the affidavits of two jurors, who had sworn that their verdict was based upon chance, he says, "The court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor;" and adds the paradoxical statement, "but in every such case the court must derive their knowledge from some other source, such as some person having seen the transaction through a window or by some such other means."[12] This latter statement has been severely criticised a number of

11—Ash v. Ash, Comberb, 357 (1697).

12—Vaise v. Delaval, 1 T. R. 11, K. B. (1785).

times. Twenty-two years later he says, "The affidavit of a juryman (pertaining to misconduct of the jury) cannot be received. It is singular indeed that almost the only evidence of which the case admits should be shut out; but considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence."[13] And five years after this Justice Yeates says, "I frankly confess that I feel the utmost repugnance to such testimony, although I am fully aware, that I thereby exclude almost the only evidence, which the case naturally admits of. But, by admitting it, I as readily perceive that I should open a door to the exercise of the most pernicious arts, and tampering with jurors; and that the practice would be replete with dangerous consequences. . . But, above all, I greatly fear that the practice, if adopted, would tend to an inquisition over the consciences of jurors, as to the grounds and reasons of their verdict, and bring questions of fact more frequently before the court for their decision than is consistent with sound policy. I am opposed to penetrating into the recesses of a jury room, through the instrumentality of jurors who are kept together until they have agreed upon their verdict."[14]

§ 24. **Same. The modern English rule.**—Lord Mansfield's rule of exclusion became firmly established in England and still obtains. Not only is the testimony or affidavit of a petit juror inadmissible to *impeach* his verdict, but it is also inadmissible to *support* it. Baron Alderson says, "It is entirely against public policy to allow a juryman to make affidavit of anything that passes in agreeing to a verdict.[15] Justice Willes says, "If the affidavits are to be taken as a statement of something that passed in the jury room, they clearly are not admissible."[16] And Justice Patteson says, "The general rule is, that the affidavits of jurors are not admissible either to support or to impugn their verdict."[17]

13—Owen v. Warburton, 1 B. & P. N. R. 326, 329.

14—Cluggage v. Swan, 4 Binn. 150, 155.

15—Straker v. Graham, 7 Dowl. 223, 225, 8 L. J. N. S. (Exch.) 86.

16—Raphael v. Bank of England, 17 C. B. 161, 174.

17—Standewick v. Hopkins, 2 D. & L. 502.

§ 25. **Same. The American rule.**—In most of the jurisdictions of this country Lord Mansfield's rule has become firmly established and obtains today. In the federal courts, however, and in the courts of Iowa, Illinois, Kansas, Nebraska, Tennessee and Texas a more liberal rule obtains. In Illinois the courts hold that the testimony or affidavit of a petit juror is admissible to support his verdict, but not to impeach it, except in a case where a part of the jurors swear that they never consented to the verdict.[18]

§ 26. **Same. The Iowa rule.**—What has come to be known as the Iowa rule, as contradistinguished from Lord Mansfield's rule, and which, it is submitted, is correct, both upon principle and public policy, is as follows: "The affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the jury-room, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent or attorney; that witnesses or others conversed as to the facts or merits of the cause out of court and in the presence of jurors; that the verdict was determined by aggregation and average, or by lot, or game of chance, or other artifice, or improper manner; but such affidavit, to avoid the verdict, may not be received to show any matter which does essentially inhere in the verdict itself, as that he misunderstood the instructions of the court, the statement of the witnesses, or the pleadings in the case; that he was unduly influenced by the statements of his fellow-jurors, or mistaken in his calculations or judgment, or other matters resting alone in the juror's breast."[19]

§ 27. **Same. Mr. Freeman's view.**—Mr. Freeman, compiler and annotator of "American Decisions," in commenting upon the Iowa rule, says: "The rule, as thus adopted by the supreme court of Iowa, seems to be the one best adapted to secure the impartial administration of justice by jury trials. It commends itself for the protection it affords litigants

18—Smith v. Eames, 3 Scam. (Ill.) 76; Martin v. Ehrenfels, 24 Ill. 187; Allison v. The People, 45 Ill. 37.

19—Justice Cole, speaking for the court, in Wright v. Ill. & Miss. Tel. Co., 20 Ia. 195.

against a verdict obtained by unlawful means, and at the same time it enshrines the deliberations of juries in the jury room with that mantle of secrecy which the policy of the law has always designed to secure, in order that a verdict may be the united judgment of all sworn to try the cause. Much as we might be inclined, however, to adopt this as the better rule, were we permitted to decide, we must yield our opinions to the great weight of modern authority, which is undoubtedly opposed to the admission of affidavits of jurors in any case to show such misconduct on their part as will vitiate their verdict'' (citing many authorities).[20]

§ 28. **Same. Chief Justice Shaw's view.**—Chief Justice Shaw, in favoring Lord Mansfield's rule, says: ''We think the judge was right in rejecting evidence of the alleged partiality and misconduct of a juror in the jury-room by the testimony of the juror himself, or of the other jurors. It is a rule founded upon obvious considerations of public policy, and it is important that it should be adhered to, and not broken in upon to afford relief in supposed hard cases. A verdict, as the name imports *(veredictum),* is taken, in theory of law, to be absolute truth, and it is important that it be so regarded. All communications among the jurors are confidential; they are intended to be secret and it is best that they should remain so. It is very probable, indeed it is almost inevitable, that many things should be said and views expressed by individual jurors, which not only have no influence on others, but which they themselves do not ultimately adhere to and act upon.''[21]

§ 29. **Same. Justice Allen's view.**—Justice Allen, of the New York Court of Appeals, in support of the same rule, says: ''There are reasons of public policy, why jurors should not be heard to impeach their verdicts, whether by showing their mistakes or their misconduct. Neither can they properly be permitted to declare, with a view to affect this verdict, an intent different from that actually expressed by the verdict as rendered in open court. In early times the pains and penal-

20—24 Am. Dec. 477.

21—Cook v. Castner, 9 Cush. (Mass.) 278.

ties visited upon jurors for false verdicts furnished an additional reason why they should not be allowed to impeach them. But the rule is well established, and at this day rests upon well-understood reasons of public policy as connected with the administration of justice, that the court will not receive the affidavits of jurymen to prove misconduct on their part, or any act done by them which would tend to impeach or overthrow their verdict. This rule excludes affidavits to show mistake or error of the jurors in respect to the merits, or irregularity or misconduct, or that they mistook the effect of their verdict, and intended something different."[22]

The following reasons have also been assigned why the affidavits of petit jurors should not be received to impeach their verdict: (1) Because they would tend to defeat their own solemn acts under oath; (2) Because their admissions would open a door to tamper with jurymen after they had given their verdict; and (3) Because they would be the means, in the hands of a dissatisfied juror, to destroy a verdict at any time after he had assented to it.[23]

§ 30. **Deliberations of grand jurors.**—The foregoing principles, applicable to the deliberations of petit jurors, are equally applicable to the deliberations of grand jurors. The testimony or affidavit of a grand juror is not admissible to impeach the indictment;[24] or to show opinions expressed in the jury room;[25] or to show how a grand juror voted, or why he so voted;[26] or, as a general rule, what a witness testified. Justice Bigelow says, "The reasons on which the sanction of secrecy which the common law gives to proceedings before grand juries is founded are said in the books to be threefold. One is that the utmost freedom of disclosure of alleged crimes and offences by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand

22—Dalrymple v. Williams, 63 N. Y. 363, 20 Am. Rep. 544.

23—Graham & Waterman on New Trials, Vol. 3, p. 1428.

24—Shoop v. People, 45 Ill. App. 110; State v. Davis, 41 Ia. 311; State v. Baker, 20 Mo. 338.

25—Jenkins v. State, 35 Fla. 737, 48 Am. St. Rep. 267.

26—State v. Johnson, 115 Mo. 480; Com. v. Hill, 11 Cush. (Mass.) 137.

jury, which, if known, it would be for the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it, before presentment is made."[27] Professor Wigmore says: "These reasons are obviously fourfold in their bearing. (a) The *grand jurors themselves* are to be secured in freedom from the apprehension that their opinions and votes may be subsequently disclosed by compulsion. (b) The *complainants* and the *witnesses* summoned are to be secured in freedom from the apprehension that their testimony may be subsequently disclosed by compulsion, and this in order that the State may secure willing witnesses. (c) The *guilty accused* is not to be provided with such clues as will enable him to flee from arrest or to suborn false testimony or tamper with witnesses. (d) The *innocent accused*, who is charged by complaint before the jury, but is exonerated by their refusal to indict, is entitled to be protected from the compulsory disclosure of the fact that he has been groundlessly accused."[28]

The rule of privilege is applicable not only to the grand jurors themselves, but also to their clerk,[29] to the prosecuting attorney,[30] and to the witnesses who appear before them.[31] In the last case, however, the privilege is not for the benefit of the witnesses. The rule is applied to them in order that the state may readily procure willing witnesses.

It has been held, however, that the testimony or affidavit of a grand juror is admissible to *support* the indictment.[32] And where a higher public policy demands it, it is also admissible to prove what a witness testified before the grand jury. Thus, where

27—Com. v. Mead, 12 Gray (Mass.) 167.

28—Wigmore on Evid., Vol. IV., p. 3312.

29—People v. Thompson, 122 Mich. 411, 81 N. W. Rep. 344.

30—Knott v. Sargent, 125 Mass. 95; State v. Johnson, 115 Mo. 480, 22 S. W. Rep. 463.

31—People v. Thompson, *supra;* People v. Lander, 82 Mich. 109, 132, 46 N. W. Rep. 956.

32—*Ex parte* Schmidt, 71 Cal. 212, 12 Pac. Rep. 55; Simms v. State, 60 Ga. 145.

the accused is on trial for perjury committed in testifying before a grand jury, a grand juror may testify to the evidence given by the accused before that body.[33] As said by Justice McSherry, "If witnesses who testify falsely before the grand jury are free from all the penalties of perjury merely because of the juror's oath of secrecy, the object designed to be effected by that clause of his oath would be perverted, and a measure intended to promote the public welfare would be transformed into a means to defeat the ends of justice. The law does not permit the obligation of secrecy which has been imposed for one purpose to be availed of for a totally different one. The grand juror's oath of secrecy cannot, therefore, be interposed to obstruct the administration of justice."[34] And the testimony of a grand juror is admissible to impeach the credibility of a witness when testifying before a petit jury.[35] Whether a grand juror may testify or not to the number concurring in the indictment is a question upon which the decisions are in conflict. In Massachusetts, New York, Pennsylvania, Alabama and some other states, the courts hold that he may.[36] In England, and in Illinois, Iowa, Indiana, Missouri, Minnesota and some other states the courts hold the contrary.[37] In the latter jurisdictions the certificate of the foreman is deemed conclusive upon this point.[38] A grand juror may testify that during the deliberations of the grand jury strangers were present.[39] He is not competent, however, to testify why an indictment was not found.[40] Nor, in some jurisdictions at least, is he competent to impeach the indictment by testifying that the prosecuting attorney was present during the deliberations of the grand jury.[41] A grand juror may

33—Com. v. Mead, 12 Gray (Mass.) 167, 71 Am. Dec. 741; State v. Wood, 53 N. H. 484.

34—Izer v. State, 77 Md. 110, 26 Atl. Rep. 282.

35—State v. Benner, 64 Me. 278; Com. v. Mead, *supra*.

36—Com. v. Smith, 9 Mass. 107; Sparrenberger v. State, 53 Ala. 481, 25 Am. Dec. 643. See also, 1 Greenleaf on Evid. § 252.

37—Gitchell v. People, 146 Ill. 175; 37 Am. St. Rep. 147 (where a number of cases are cited and approved).

38—Gitchell v. People, *supra;* Rex v. Marsh, 6 Ad. & El. 236, 33 E. C. L. 66.

39—State v. Will, 97 Ia. 58.

40—Owens v. Owens, 81 Md. 518.

41—State v. Johnson, 115 Mo. 480.

testify to confessions made before the grand jury.[42] The prosecuting attorney may be called to impeach a witness who also testified before a grand jury.[43] And a grand juror is competent to support a witness who testified before the grand jury, as well as to impeach him.[44]

§ 31. **Deliberations of arbitrators.**—Generally speaking, the principles applicable to the deliberations of petit jurors are also applicable to the deliberations of arbitrators. But since arbitrators exercise functions of both judge and jury, the precise scope of the issues upon which the award is made is not open to investigation like that of the issues upon which the verdict of a petit jury is made. Arbitrators are not competent witnesses to impeach their award,[45] except in the case of fraud or mistake.[46] Chief Justice Walker says, "As a general rule, arbitrators will not be permitted to give evidence to impeach their award; to this rule there is an exception in cases of fraud (giving citations), and an exception has been allowed to establish a mistake in the award."[47] Arbitrators may refuse to state the reasons or grounds of their award, what items it includes, or what they meant by it. The award is conclusive upon the parties both as to the law and the facts.[48] The conclusion reached by arbitrators is the judgment of the court of the parties' own choosing, and in most respects it is similar to other judgments. Arbitrators are competent witnesses to support their award;[49] but not to prove their own misconduct,[50] or that of their fellow-arbitrators.[51] They may testify to the circumstances under which

42—Hinshaw v. State, 147 Ind. 334; United States v. Porter, 2 Cranch (C. C.) 60, 27 Fed. Cas. No. 16,072.

43—State v. Van Buskirk, 59 Ind. 384.

44—People v. Hulbut, 4 Denio (N. Y.) 133, 47 Am. Dec. 244.

45—Stone v. Atwood, 28 Ill. 30; Ellison v. Weathers, 78 Mo. 115.

46—Spruck v. Crook, 19 Ill. 415; Pulliam v. Pensoneau, 33 Ill. 375; 1 Greenleaf on Evid., § 249.

47—Pulliam v. Pensoneau, *supra.*

48—Pulliam v. Pensoneau, *supra.*

49—Stone v. Atwood, *supra;* Ellison v. Weathers, *supra.*

50—Claycomb v. Butler, 36 Ill. 100; Tucker v. Page, 69 Ill. 179.

51—Tucker v. Page, *supra.*

the award was made, and when it was made;[52] and in a legal proceeding to enforce their award they may testify to matters material to the issue.[53]

§ 32. **Social communications. Husband and wife.**—Confidential communications between husband and wife have always been privileged.[54] At the common law neither spouse was a competent witness either for or against the other. Enabling statutes have been enacted very generally modifying this rule, but these statutes do not affect the rule of privilege applicable to confidential communications between husband and wife.[55] The basis of this rule of privilege is the sacredness of the marital relation. As said in a recent case by Chief Justice Taylor, "Society has a deep-rooted interest in the preservation of the peace of families, and in the maintenance of the sacred institution of marriage; and its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from the marital status. Therefore the law places the ban of its prohibition upon any breach of the confidence between husband and wife, by declaring all confidential communications between them to be incompetent matters for either of them to expose as witnesses."[56]

There exists, as is pointed out by Professor Wigmore,[57] much confusion in the decisions owing to failure on the part of some courts to discriminate between the marital disqualifications to testify and the anti-marital privilege. The disqualification of one spouse to testify on behalf of the other is quite a different matter from the privilege of one spouse against the disclosure of communications by the other. The courts, however, frequently confuse these matters. It is to be ob-

52—Woodbury v. Northy, 3 Me. 85, 14 Am. Dec. 214.

53—Graham v. Graham, 9 Pa. St. 254, 49 Am. Dec. 557.

54—Hopkins v. Grimshaw, 165 U. S. 342; Geer v. Goudy, 174 Ill. 514; Fuller v. Fuller, 177 Mass. 184; Derham v. Derham, 125 Mich. 100.

55—Bassett v. United States, 137 U. S. 496; Hyde v. Gannett, 175 Mass. 177, 55 N. E. Rep. 991; People v. Wood, 126 N. Y. 249, 27 N. E. Rep. 362.

56—Mercer v. State, 40 Fla. 216, 24 So. Rep. 154.

57—Wigmore on Evid., Vol. IV., § 2334.

served that a *disqualification* is never subject to waiver, whereas a *privilege* usually is. This distinction, however, is frequently overlooked. Thus, as pointed out by Professor Wigmore, a common error of the courts is to ignore the husband's right to waive the privilege when he offers to prove by his wife communications made by him to her. The "erroneous tendency is to treat the disclosure as absolutely prohibited in spite of his consent."

To render the communications privileged, a valid marriage is essential. If either of the parties has been previously married to a third party who is still living and not divorced the communications are not privileged.[58] It is also essential that the communications be made during the existence of the marital relation. If made before the relation was created, or after it was terminated, they are not privileged.[59] An injunction of secrecy is not essential to create the privilege.[60]

By the weight of authority it is essential that the communications be confidential in their nature.[61] This is the English rule, as it obtains at common law.[62] In a few states the courts extend the privilege to all communications between the spouses.[63] And in a few others they extend it to all information acquired by virtue of the marital relation.[64] According to the last view the privilege is applicable not only to positive acts,[65] but also to silence on a particular subject.[66] Justice Sheldon says, "We do not find from the authorities, that this rule of exclusion is confined to subjects which are confidential in their nature, and we think it should apply whenever the wife is called

58—Cole v. Cole, 153 Ill. 585, 38 N. E. Rep. 703; Wells v. Fletcher, 5 C. & P. 12, 24 E. C. L. 198.

59—Stillwell v. Patton, 108 Mo. 352, 18 S. W. Rep. 1075.

60—Robin v. King, 2 Leigh (Va.) 140.

61—Seitz v. Seitz, 170 Pa. St. 71; Hagerman v. Wigent, 108 Mich. 192; Parkhurst v. Berdell, 110 N. Y. 386; Beyerline v. State, 147 Ind. 125.

62—Aveson v. Kinnaird, 6 East 194; Beveridge v. Minter, 1 C. & P. 364, 11 E. C. L. 421.

63—Com. v. Hayes, 145 Mass. 289; Newstrom v. St. Paul, etc., Ry. Co., 61 Minn. 78.

64—Pyle v. Oustatt, 92 Ill. 209; Mercer v. State, *supra;* Perry v. Randall, 83 Ind. 143; Holman v. Bachus, 73 Mo. 49; McCague v. Miller, 36 Ohio St. 595.

65—Perry v. Randall, *supra.*

66—Goodrum v. State, 60 Ga. 509.

upon to disclose any matter, which came to her knowledge in consequence of the marriage relation."[67] But, as said by Professor Wigmore, "The essence of the privilege is to protect confidences only."[68] And as said by President Green, "Where there is not even a seeming confidence, when the act done or declaration made by the husband, so far from being private or confidential, is designedly public at the time, and from its nature must have been intended to be afterwards public, there is no interest of the marriage relation or society which in the absence of all interest of the husband or wife requires the latter to be precluded from testifying between other parties to such act or declaration not affecting the character or person of her husband."[69] Letters written by one spouse to the other are privileged;[70] and also documents intrusted by one spouse to the custody of the other.[71] In some jurisdictions the courts hold that the privilege may be asserted even in the case of vituperative epithets by one spouse against the other;[72] while in other jurisdictions the courts hold the contrary.[73] Where one of the spouses is on trial for a crime committed against a third party, the rule of privilege is applicable;[74] but it is held that, where one spouse is on trial for a crime against the other spouse, it is not.[75] In civil actions between the spouses themselves, the rule is held to be applicable in some jurisdic-

67—Reeves Jr. v. Herr, 59 Ill. 81, 85 (In this case it is held that in an action by the executor of a deceased person, to recover on an account in favor of the deceased against the defendant, the widow of the testator is incompetent to testify for the plaintiff in relation to a conversation of the defendant with her husband in her presence during coverture, in regard to the account, by which it was sought to prove an admission by the defendant of the account sued on, and a promise on his part to pay the same within the period fixed by the statute of limitations barring such an action).

68—Wigmore on Evid., Vol. IV., § 2336.

69—White v. Perry, 14 W. Va. 66, 80.

70—Derham v. Derham, 125 Mich. 109; State v. Ulrich, 110 Mo. 350.

71—Toole v. Toole, 107 Ga. 472.

72—King v. King, 42 Mo. App. 454.

73—French v. French, 14 Gray (Mass.) 186.

74—People v. Mullings, 83 Cal. 138, 17 Am. St. Rep. 223.

75—Jordan v. State, 142 Ind. 422; People v. Warner, 117 Cal. 637.

tions,[76] and in some not.[77] In divorce suits especially, the rule, in some jurisdictions, is not applicable.[78]

Where a conversation between the spouses is overheard by a third party the rule is not applicable. In such cases even an eavesdropper may testify to the conversation.[79] But where the conversation takes place in the presence of a third party who is incapable of understanding it,[80] or in the presence of the youthful members of the family,[81] the reason for this exception to the rule of privilege fails and the rule itself is applicable. Where letters by one spouse to the other get into the hands of third parties most courts hold that the privilege is gone.[82] Others hold that where this happens unintentionally on the part of the spouses, and without their fault, it is not.[83]

Where a third party is on trial for the murder of one spouse, the other spouse is a competent witness to testify to dying declarations of the deceased. As said by Justice Hobson, "On grounds of public policy, the wife cannot testify against the husband as to what came to her from him confidentially or by reason of the marriage relation, but this rule does not apply to a dying communication made by the husband to the wife on a trial of the one who killed him. The declaration of deceased made in extremis in such cases is the thing to be proved, and this proof may be made by any competent witness who heard the statement. The wife may testify for the state, in cases of this character, as to any other fact known to her."[84] And

76—Hall v. Hall, 77 Mo. App. 600; French v. French, 14 Gray (Mass.) 186.

77—Goelz v. Goelz, 157 Ill. 33; Joiner v. Duncan, 174 Ill. 252; Hunt v. Eaton, 55 Mich. 362.

78—Smith v. Smith, 77 Ind. 80; Robinson v. Robinson, 22 R. I. 121.

79—Com. v. Griffin, 110 Mass. 181; People v. Hayes, 140 N. Y. 484, 37 Am. St. Rep. 572; State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

80—Schierstein v. Schierstein, 68 Mo. App. 205.

81—Hopkins v. Grimshaw, 165 U. S. 342; Lyon v. Prouty, 154 Mass. 488 (In this case the court holds that the presence of a fourteen-year-old daughter will not destroy the privilege).

82—State v. Ulrich, 110 Mo. 350; People v. Hayes, 140 N. Y. 484, 37 Am. St. Rep. 572.

83—Scott v. Com., 94 Ky. 511, 42 Am. St. Rep. 371; Mercer v. State, 40 Fla. 216, 74 Am. St. Rep. 135.

84—Hilbert v. Com. (Ky. 1899), 51 S. W. Rep. 817.

either spouse may testify to the fact of marriage.[85] Or to any fact within the personal knowledge of either spouse not communicated by the other.[86]

Where one spouse acts as the agent of the other it is usually held that the rule of privilege does not apply.[87] And likewise as to business negotiations generally.[88] Nor does the rule apply in certain cases of fraud. As said by Justice Sherwood, "where a husband is made the conduit and mouthpiece of the fraud of others, and in furtherance of that fraud prevails upon his wife to sign a note and incumber her property, a court of equity, in the absence of other evidence, in order to unearth that fraud and to expose it in all of its details, will *ex necessitate rei*, and upon a familiar common law principle, respecting evidence of fraud, permit both husband and wife to testify as to the conversations had between them in regard to the transaction."[89]

At common law, neither spouse may waive the privilege with respect to confidential communications between them. Lord Ellenborough says, "It is sound doctrine, that trust and confidence between man and wife shall not be betrayed."[90] And Justice McLean says, "To break down and impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence."[91] In most jurisdictions, however, the privilege may be waived. In some of them it may be waived by the party who made the communication.[92] While in others concurrence on the part of both spouses is essential.[93] Taking the stand and testifying with respect to the communication constitutes a waiver;[94] and so does calling the other spouse to testify to

85—Chase v. United States, 7 App. Cas. (D. C.) 149.

86—Brown v. Johnson, 101 Wis. 661; White v. Perry, 14 W. Va. 66.

87—State v. Burlingame, 146 Mo. 207; Schmied v. Frank, 86 Ind. 250. *Contra*, Com. v. Hayes, 145 Mass. 289; Kelly v. Andrews, 102 Ia. 119.

88—Beitman v. Hopkins, 109 Ind. 177.

89—Moeckel v. Heim, 134 Mo. 576, 580.

90—Aveson v. Kinnaird, 6 East, 192.

91—Stein v. Bowman, 38 U. S. 207, 222.

92—Stickney v. Stickney, 131 U. S. 227; Hutchason v. State, 67 Ind. 449.

93—People v. Wood, 126 N. Y. 249; Maynard v. Vinton, 59 Mich. 139, 60 Am. Rep. 276.

94—State v. Turner, 36 S. C. 534, 15 S. E. Rep. 602.

it.[95] But testifying generally in the cause does not.[96] Nor does the death of either spouse or a decree of divorce.[97]

§ 33. **Business communications. Telegraphic dispatches.**—As a general rule, ordinary business communications are not privileged. Though made in confidence their disclosure may be compelled. Thus, communications made between a principal and agent,[1] or master and servant,[2] or guardian and ward,[3] or copartners,[4] or codefendants,[5] or cotenants,[6] are not privileged. Nor are communications between members of fraternal organizations privileged at common law. Thus it has been held that communications between members of the Masonic order are not privileged.[7] Nor are communications made to newspaper reporters privileged.[8] Nor those made to a commercial agency.[9] Nor those made to a banker.[10] The mere fact that a communication was made in confidence under a pledge of privacy, or oath of secrecy, will not prevent its disclosure in a court of justice.[11]

Telegraphic dispatches are not privileged communications. The telegraph company, through its agents, can be compelled to disclose them.[12] A few able jurists, however, have advocated that, on the ground of public policy, they should be treated as privileged. Thus, Justice Cooley says, "The telegraph is used as a means of correspondence, and as a valuable and in many cases an indispensable substitute for the postal facilities; and the communication is made, not because the

95—Columbia, etc., Ry. Co. v. Hawthorne, 3 Wash. Ter. 353.

96—People v. Mullings, 83 Cal. 138, 17 Am. St. Rep. 223.

97—Geer v. Goudy, 174 Ill. 514; Hopkins v. Grimshaw, 165 U. S. 342; Owen v. State, 78 Ala. 425, 56 Am. Rep. 40; Hitchcock v. Moore, 70 Mich. 112; State v. Kodat, 158 Mo. 125; Brock v. Brock, 116 Pa. St. 109.

1—Kerr v. Gillespie, 7 Beav. 572.

2—Falmouth v. Moss, 11 Price 455.

3—Sutton v. Sutton (Tenn. Ch. 1900) 58 S. W. Rep. 891.

4—Wills Point Bank v. Bates, 72 Tex. 137.

5—Hamilton v. Nott, L. R. 16 Eq. 112, 42 L. J. Ch. 512.

6—Sutton v. Sutton, *supra*.

7—Owens v. Frank, 7 Wyo. 457.

8—People v. Durrant, 116 Cal. 179.

9—Shaner v. Alterton, 151 U. S. 607.

10—Loyd v. Freshfield, 2 C. & P. 325, 329.

11—Cox v. Montague, 24 C. C. A. 364, 78 Fed. Rep. 845.

12—United States v. Hunter, 15 Fed. Rep. 712; Woods v. Miller, 55

party desires to put the operator in possession of facts, but because transmission without it is impossible. It is not voluntary in any other sense than this, that the party makes it rather than deprive himself of the benefits of this great invention and improvement. The reasons of a public nature for maintaining the secrecy of telegraph communication are the same with those which protect correspondence by mail; and though the operator is not a public officer, that circumstance appears to us immaterial. He fulfils an important public function; and the propriety of his preserving inviolable secrecy in regard to communications is so obvious that it is common to provide statutory penalties for disclosure. If on grounds of public policy the operator should not voluntarily disclose, why do not the same considerations forbid the Courts compelling him to do so?"[13] And Baron Bramwell says, "I really think that for the public good there ought to be no power of compelling the production of these documents. It is the necessary consequence that persons who correspond by telegram are obliged to repose confidence in the Crown, and I believe it will be for the public good if it is found that that is a confidence that the Crown cannot be compelled to violate. Inconvenience might arise in many cases. It might arise in the case of a confidential communication between attorney and client, or husband and wife; therefore we must look to the general principle."[14]

In England, telegraphic dispatches were originally treated as not privileged.[15] After the Government assumed control of the telegraphic service in 1868, the courts for a time took the opposite view;[16] but later they abandoned it, and since then the original view has obtained.[17] In this country,[18] and in Canada,[19] the original English rule has always obtained.

Ia. 168, 39 Am. Rep. 170; State v. Litchfield, 58 Me. 267; *Ex parte* Brown, 72 Mo. 83, 37 Am. Rep. 426.

13—Cooley's Constitutional Limitations (6th ed.), p. 371, note.

14—Stroud Election Cases, 2 O'M. & H. 107, 112.

15—Henislaw v. Freedman, 2 Pars. Eq. Cas. 274.

16—Stroud Election Cases, *supra.*

17—*Re* Smith, L. R. Ir., 7 Ch. Div. 286.

18—Cases cited in foot-note 12.

19—*Re* Dwight v. Maclam, 15 Ont. 148, 154 (able opinion by Chancellor Boyd).

Upon principle, telegraphic dispatches should not be treated as privileged. As said by Professor Wigmore, "the very first condition of a privilege is lacking, namely, the intention to keep the message secret in the hands of the transmitter. It is given to him for the sole purpose of being delivered to some one else; and that some one else is not only compellable to disclose it in court, but (for aught that appears) may freely and honorably publish it to others at any time. In short, there is no ultimate and absolute confidentiality in a telegram, but only a mediate and relative secrecy. Since the law need not respect its privacy in its ultimate stage, there is no reason for respecting the intermediate stage."[20] Nor should they be treated as privileged on grounds of public policy. As said by Justice King, "If we adopt this construction of the law, the telegraph may be used with the most absolute security for purposes destructive to the well-being of society,—a state of things rendering its absolute usefulness at least questionable. The correspondence of the traitor, the murderer, the robber, and the swindler, by means of which their crimes and frauds could be the more readily accomplished and their detection and punishment avoided, would become things so sacred that they never could be accessible to the public justice, however deep might be the public interest involved in their production. For the result of the principle contended for is that the seal of secrecy is placed on all telegraphic communications, as well in courts of justice as elsewhere, and that they are to be classed with privileged communications, such as those between husband and wife, counsel and client. . . . The law is jealous of extending the circle of persons excused or interdicted from giving testimony. Parents are required to testify against children, children against parents, brothers against brothers, friends against friends. Communications by letter, made under the deepest obligations of friendship, affection or honor, still must be produced, if deemed necessary to the ascertainment of the truth and the administration of justice by the public tribunals. To this great end of social organization, all secondary causes are required to give way."[21]

20—Wigmore on Evid., Vol. IV., p. 3191.

21—Henislaw v. Freedman, *supra.*

CHAPTER III.

EXAMINATION OF WITNESSES.

§ 1. **Swearing the witnesses.**—Before witnesses are examined they are sworn or affirmed. This is to quicken their consciences with the view of insuring the truth. As said by Best, "The object of the law in requiring an oath is to get at the truth by obtaining a hold on the conscience of the witness."[1] And as said by Justice Somerville, it is "to purge the conscience, and impress the witness with a due sense of religious obligation, so as to secure the purity and truth of his testimony under the influence of its sanctity."[2] And as said by Justice Ashburn, "The purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God; not to call upon Him to punish the false-swearer, but on the witness to remember that He will surely do so. By thus laying hold of the conscience of the witness and appealing to his sense of accountability, the law best insures the utterance of truth."[3]

§ 2.—**Form of administering the oath.**—The form of administering the oath varies in different jurisdictions. Its force is subjective rather than objective. It should be administered in such form as will most effectively serve the purpose of quickening the conscience of the witness and stimulate him to tell the truth. As said by Chief Justice Reynolds, "The pure principle of the common law is that oaths are to be administered to all persons according to their own opinions, and as it most affects their consciences."[4] And as said by Lord Chief Justice Mansfield, "upon the principles of the common law there is no particular form essential to an oath to be taken by a witness; but as the purpose of it is to bind his conscience, every man of every religion should be bound by that form which he himself

1—Best on Evid., § 161.

2—Blackstone v. State, 71 Ala. 33.

3—Clinton v. State, 33 Ohio St. 319.

4—Gill v. Caldwell, 1 Ill. 53.

thinks will bind his own conscience most."[5] And as said by Lord Chancellor Hardwicke, "It is laid down by all writers that the outward act is not essential to the oath. . . . It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking."[6] And as said by Lord Stairs, "It is the duty of judges in taking the oaths of witnesses to do it in those forms that will most touch the conscience of the swearers according to their persuasion and custom; and though Quakers and fanatics deviating from the common sentiments of mankind refuse to give a formal oath, yet if they do that which is materially the same, it is materially an oath."[7] Quakers and others, however, who have refused to take an oath owing to conscientious scruples against swearing have been committed to jail for contempt. This happened in England as late as 1854.[8] It also happened in Boston in 1815.[9] According to the modern rule, however, based very generally upon statutes, such persons may affirm.

§ 3. **Same. Usual forms at common law.**—At the English common law, the usual form of administering the oath in criminal cases is as follows: The clerk of the court hands the witness a copy of the Bible and then says to him, "The evidence you shall give between our sovereign lord the king and the pris-

5—Atcheson v. Everitt, Cowp. 389.

6—Omichund v. Barker, 1 Atk. 45 (This is a leading English case and one which has been very frequently cited and commented upon. See 9 Harvard Law Review for an article on it and some others decided a little earlier. It was decided 1745. In commenting upon it in 1852, Baron Alderson, in Miller v. Salomons, 7 Exch. 535, 558, says: "Omichund v. Barker has settled that it ought to be taken in that form and upon that sanction which most effectually binds the conscience of the party swearing. Thus, a Jew is to be sworn on the Book of the Law and with his head covered, a Brahmin by the mode prescribed by his peculiar faith, a Chinese by his special ceremonies, and the like." And in the same case Chief Baron Pollock says, "It appears to me to have decided merely this,—that the common law of England agrees with the law of nations, that the form of an oath is to be accommodated to the religious persuasion which the swearer entertains.").

7—Institutes of the Laws of Scotland, p. 692; and quoted with approval by Lord Chief Justice Willes in Omichund v. Barker, *supra*.

8—Powell on Evid. (4th ed.) 32.

9—United States v. Coolidge, 2 Gall. 363.

oner at the bar shall be the truth, the whole truth, and nothing but the truth. So help you God." In civil cases the clerk says to the witness, "The evidence that you shall give to the Court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth. So help you God." The witness in each case then kisses the Book.[10]

§ 4. **The custom of kissing the Bible.**—The custom which obtained for centuries in England of witnesses kissing the Bible has been criticised frequently. Professor Wigmore says, "The custom of kissing the Book is now coming to be generally recognized as both repulsive and unsanitary."[11] And in a recent case the trial judge characterized it as "a relic of idolatry." In explanation of his statement he said further, "I mean that it was established by the church to show the humiliation of the people before the first judges, who were clerics. It has been abolished in England, judicial declarations, subject to penalties, being substituted. I mean that it is a relic of a superstitious age and superstitious people, under the subjection of priestcraft. It is a relic of that age when trial by fire took the place of trial by jury; when a man's guilt or innocence depended on his physical capacity to resist pain and torture; but its worst feature is the dirt and disease which is imparted to the book by the constant handling it receives from dirty witnesses. . . . It is like the custom of kissing the brass toes of graven images. . . . I think swearing on the Bible should be abolished. I think a witness can take just as good an oath with the uplifted hand as on the Bible."[12] To secure better sanitary conditions, in some jurisdictions celluloid covers have been provided.[13] In this country it has been very generally held that swearing with uplifted hand, without the Bible, is sufficient at common law.[14] And in the case of a Chinese witness, to snuff out a candle and to pray that he be snuffed out likewise if he commits perjury has been held sufficient.[15]

§ 5. **Constitutional and statutory provisions relating to oaths.**—In practically all of the jurisdictions of this country

10—Chitty's Criminal Law (4th Amer. ed.). Vol. I, p. 616.

11—Wigmore on Evid., Vol. III, p. 2353, note.

12—31 Central Law Journal 93.

13—20 Montreal Legal News 274.

14—Gill v. Caldwell, *supra;* McKinney v. People, 7 Ill. 540.

15—State v. Gin Pou, 16 Wash. 425, 47 Pac. Rep. 961.

the injustice of the English common law rule relating to oaths has been removed, either by constitutional or statutory provisions, or by both. But in no jurisdiction has the use of the oath been abolished. Some of these provisions are merely declaratory of the common law. In some instances they merely duplicate each other, and in some they are inconsistent with each other. The constitutional provisions very generally guarantee that a person's theological belief shall not affect his civil capacity, and this includes his competency to act as a witness. In two states, however, the constitutions expressly declare that a theological belief is essential to the competency of a witness. These two states are Maryland and Arkansas.[16] The statutes very generally provide that a witness may choose to make affirmation instead of oath. Oklahoma is the only state in which statutes upon this subject do not provide this alternative. The Oklahoma statute is as follows: "Before testifying, the witness shall be sworn to testify to the truth, the whole truth, and nothing but the truth. The mode of administering an oath shall be such as is most binding on the conscience of the witness."[17]

§ 6. **Same. Constitutional and statutory provisions in Illinois.**—The constitution of Illinois provides as follows: "No person shall be denied any civil or political right, privilege, or capacity, on account of his religious opinions; but the liberty

16—The provisions in the Maryland constitution are as follows: "Nor shall any person, otherwise competent, be deemed incompetent as a witness or juror on account of his religious belief; provided he believes in the existence of God, and that under His dispensation such person will be held morally acountable for his acts and be rewarded or punished therfor either in this world or the world to come. . . That the manner of administering an oath or affirmation to any person ought to be such as those of the religious persuasion, profession, or denomination of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being." Constitution of 1867, Articles 36 and 39.

The provisions in the Arkansas constitution are as follows: "Nor shall any person be rendered incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths or affirmations. . . No person who denies the existence of a God shall . . . be competent to testify as a witness in any court." Constitution of 1874, Art. II, § 26, and Art. XIX, § 1.

17—Statutes of 1893, § 4229.

of conscience hereby secured shall not be construed to dispense with oaths or affirmations."[18] And the statutes of this state provide as follows: "The person swearing shall, with his hand uplifted, swear by the everliving God, and shall not be compelled to lay the hand on or kiss the Gospels . . . (and that when) such person shall have conscientious scruples against taking an oath, he shall be admitted, instead of taking an oath, to make his solemn affirmation or declaration in the following form, to-wit: You do solemnly, sincerely and truly declare and affirm. Which solemn affirmation or declaration shall be equally valid as if such person had taken an oath in the usual form; and every person guilty of falsely and corruptly declaring, as aforesaid, shall incur and suffer the like pains and penalties as are or shall be inflicted on persons convicted of willful and corrupt perjury."[19]

§ 7. **Extent of the option to swear or affirm.**—Under the legislative provisions which give the option of swearing or affirming, witnesses who have a theological belief, and have no conscientious scruples against taking an oath, are, as a general rule, not allowed to affirm. In some jurisdictions, however, such persons are allowed to affirm, as well as those who have no theological belief, or who have conscientious scruples against taking an oath.

§ 8. **Effect of testifying without being sworn or affirmed.**—Where a witness testifies without being sworn or affirmed, and the omission is not discovered until after the verdict is rendered, the verdict will be set aside.[20] But where the omission is discovered before the jury retires, and no objection is made, the error will be deemed waived. As said by Justice Hanna, "The statute (2 R. S., p. 80) requires witnesses to be sworn, which is but in accordance with the doctrines of the elementary writers. 1 Greenl. Ev. § 328. But in the case at bar, we are not informed when the mistake, as to the testimony having been given without the sanction of an oath, was discovered by the complaining party. The first we hear of it is in the reasons for a new trial.

18—Constitution of 1870, Art. II, § 3.

19—Revised Statutes of 1874, chap. 101, §§ 3 and 4.

20—Reg. v. James, 6 Cox C. C. 5; Hawkes v. Baker, 6 Me. 72.

If it was known before the jury retired, the mistake could have been corrected by swearing the witness and rehearing the evidence; or if that course was not taken, by an instruction to the jury to disregard his statements. If no motion was made upon the discovery, by either party, it would amount to an acquiescence in the reception of his statements as evidence in the case."[21] And as said by Chief Justice Shaw, "Taking the facts as stated, the Court are of opinion, that the defendant, knowing that the witness had not been sworn, before the cause went to the jury, without giving notice thereof to the Court, or taking any exception, has waived his right to except, after verdict. . . . In the present case, if notice had been seasonably given and the exception taken, the witness might probably have been recalled; if not, the jury should have been discharged, to avoid giving an erroneous and useless verdict. Had the witness been recalled, and confirmed his testimony on re-examination, the defect would have been cured; had he refused to do so, the cause might have been withdrawn from the jury, or other proper course adopted. But a verdict having been taken, with knowledge of the omission of the witness to be sworn, through inadvertence of all parties, the objection comes too late, and cannot effect the validity of the verdict."[22]

§ 9. **Effect where an atheist takes the oath and testifies. Bradlaugh's case.**—At the common law an atheist is an incompetent witness. If, however, he tenders himself as a witness and gives evidence under oath, he cannot take advantage of his own wrong. If, therefore, he testifies falsely he may be punished for committing perjury. Other persons, however, may object to the validity of his testimony and to his incompetency, if the objection be made in due season.

Moreover, under the English Parliamentary Oaths Act he cannot qualify himself, as a member of parliament, to vote. In a celebrated English case, decided in 1885, Mr. Bradlaugh, the defendant, had been elected a member of parliament. He had no belief in a Supreme Being, but he repeated and subscribed the oath required of the members and voted. He was prosecuted by the Attorney-General for voting without having taken

21—Slaughter v. Whitelock, 12 Ind. 338.

22—Cady v. Norton, 31 Mass. 236.

the oath of allegiance within the meaning of the Parliamentary Oaths Act and judgment was entered against him. Lord Chief Justice Coleridge, in summing up the case to the jury, said the meaning of the term "I swear," in the Act, meant "I invoke the protection or the vengeance of the Supreme Being, according as I perform or break the promise with which such appeal is now made to Him." An appeal was taken, and Brett, Master of the Rolls, said, "No oath can be legally taken by a person who has no belief in a Supreme Being: this is established by a long string of authorities, but it is only necessary to cite Omichund v. Barker (1) to show that in order that an oath may be lawfully taken, there must exist a belief in a Supreme Being. . . . A witness, who does not regard an oath as binding upon him, nevertheless may be convicted of, and sentenced for perjury, if he gives false evidence; for he has tendered himself as a competent witness, and he shall not be allowed to take advantage of his own wrong by alleging that he was incompetent to be sworn. . . . If a man takes an oath, he himself is estopped from denying its validity; but other persons may object that he is incompetent to take it."[23]

§ 10. **The true purpose of the oath. The early view. Its injustice. The modern view.**—The true purpose of the oath is to increase testimonial efficiency of the witness by quickening his conscience and thereby stimulating him to tell the truth. According to the early view its purpose in a measure was misconceived. This misconceived purpose was to exclude witnesses from testifying merely because they lacked theological belief, or had conscientious scruples against taking an oath. As a result, suitors were often denied a full measure of justice. This early misconception, however, and its consequent injustice, have been largely eliminated. As said by Professor Wigmore, "The true purpose of the oath is not to exclude any competent witness, but merely to add a stimulus to truthfulness wherever such a stimulus is feasible. Until the 1800s, however, this advanced notion of its purpose had not been reached. The requirement was inexorable; with the result that three classes of persons were absolutely excluded from testifying, namely, adults having an atheistical belief, infants lacking any theologi-

23—Attorney-General v. Bradlaugh, 14 Q. B. D. 667, 671, 680, 681.

cal belief, and adults having the requisite belief but forbidden by conscience to take an oath. It came gradually to be perceived that the use of the oath, not to increase testimonial efficiency, but to exclude qualified witnesses, was not only an abuse of its true principle, but also a practical injustice to suitors who needed testimony. This injustice is clearly enough seen to-day; but its perception was naturally slow in coming, so long as in the community at large the profession of belief in deism or atheism was associated closely with the notion of moral defects. This association hardly passed away in any degree until the middle of the 1800s,—an era marked at the same time, by the indirectly related movements of literary romanticism, political liberalism, industrial invention, legal free speech, and theological free thought. The first statutory efforts in England to relieve from this injustice are found at the end of the first quarter of the 1800s. To-day, practically everywhere, the injustice is remedied. Arguments are no longer needed to prove the impropriety of the old inexorable rule. It is conceded that the oath should be dispensed with for appropriate classes of witnesses. We are today at the end of that stage of the question. What is to be noted (but is sometimes forgotten) is that the demand for the dispensation of the oath for witnesses for whom it is inappropriate differs entirely from the proposal to abolish the oath for persons theologically capable of taking it. One is a question of the past; the other is a question for the future."[24]

§ 11. **Capacity of infants to testify. Oath-capacity and testimonial qualifications distinguished.**—At the English common law a child who was incompetent to take an oath was an incompetent witness. There was no precise age, however, under which an infant was excluded on the presumption that he possessed insufficient intelligence. At the age of fourteen years he was presumed to have ordinary discretion and understanding. Under that age there was no presumption one way or the other. Whether he possessed sufficient understanding and understood the nature and meaning of an oath, or not, were matters for the trial judge to determine. This preliminary examination usually took place in open court. The child was questioned concerning

24—Wigmore on Evid., Vol. III, § 1827, par. (2).

the nature of an oath, and what would become of him if he told a lie. The usual reply was that he would go to hell, or to the bad place. This reply was usually considered satisfactory. In an early case the court say: "An infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears on strict examination by the Court to possess a sufficient knowledge of the nature and consequences of an oath. For there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received."[25]

Generally speaking, this early rule still obtains. It is very doubtful, however, that the competency of an infant to testify should depend upon any theological test. In some jurisdictions, including Michigan, statutes have been passed which allow infants under ten years of age or thereabouts to testify without taking an oath. These statutes are sensible, and should prevail in every jurisdiction. The Michigan statute provides substantially that whenever a child under ten years of age is desired as a witness, the court shall ascertain whether he has sufficient understanding and sense of moral obligation to tell the truth or not; and if he has such he may be admitted to testify on his promise to tell the truth. No oath is essential. The jury may give his testimony such credit as they think it deserves.[26] Professor Wigmore says, "But it may be doubted whether this analysis of a child's belief, which sometimes becomes a far from edifying proceeding, is ever of any real profit. A child's inclination to tell the truth or the opposite is apt to be more a matter of instinct and of previous training and surroundings than of a conscientious reflection upon the prospects of a future state. It has already been suggested (*ante*, § 509, *post*, § 1826) that, for any purpose whatever, the preferable course is to accept a child's story for what it seems to be worth, as ascertainable upon testifying, and not to impose any fixed limitations. For the same reasons, any theological tests, especially when applied in

25—Rex v. Brasier, East. Pleas of the Crown, I, 443 (1779).

26—Howell's Ann. Statutes, § 7546, a.

crude form by laymen in court, must be more or less inappropriate."[27]

It is to be observed, therefore, that capacity to take an oath and capacity to testify are not synonymous terms. According to the early view, however, they were so considered. The oath is a special test or security of trustworthiness, and should always be used where the witness possesses a theological belief and has no conscientious scruples against taking an oath. But, on the other hand, where a witness has not the capacity to take an oath, but possesses sufficient intelligence and a moral sense to tell the truth he should not be excluded from giving his testimony.

§ 12. **The custom of swearing several witnesses at the same time.**—The custom of swearing at the same time all the witnesses called by one of the parties to the suit is a pernicious one. It saves time, but its objectional features outweigh this advantage. It is not against principle, but it is against public policy. Its chief objectionable features are the following: (1) It weakens the solemnity of the act. Bunching a number of witnesses together apparently diminishes the obligation of each, and weakens the individual impressiveness of the occasion: (2) The interval which intervenes between the act of taking the oath and the act of testifying tends to diminish the influence of the former upon the mind of the witness; and (3) It tends to produce confusion.

§ 13. **Publicity of the examination. Its advantages. Its limitations.**—In the ecclesiastical courts, and in others which have borrowed their system of procedure from the civil law, trials are conducted secretly. Under the common law, however, they are conducted publicly. Bishop says, "It is the immemorial usage of the common law, not only in England, but in every part of this country, since its earliest settlement, to try all prisoners in open court, to which spectators are admitted."[28] An amendment to the Federal Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."[29] And

27—Wigmore on Evid., Vol. III, § 1821, par. (b).

28—1 Bish. Crim. Proc. § 957.

29—Federal Constitution, Art. 6 of the amendments.

the constitutions of the various states contain the same provision or similar ones.

Public trials have decided advantages over secret trials. In the first place they play an important part in stimulating witnesses to tell the truth. A witness who is inclined to falsify will naturally be more inclined to tell the truth if persons are present who may also be informed. Their presence will tend to inspire him with a wholesome fear of being prosecuted for perjury should he testify falsely. As said by Sir William Blackstone, "This open examination of the witness, *viva voce*, in the presence of all mankind, is more conducive to the clearing up of truth than the private and secret examination taken down before an officer or clerk in the ecclesiastical courts and all others that have borrowed their practice from the civil law; where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal."[30] Then again, public trials are conducive to correct and conscientious conduct on the part of all the court officials. The publicity of the occasion is an inspiration to the efficient and faithful performance of official duties. And lastly, public trials are effectual in inspiring in the public at large a confidence in judicial investigations and in the administration of justice that could not be inspired by any secret procedure.

This wise and general system, however, has some limitations. Cases arise in which public policy demands that it be limited. And in some jurisdictions, including England, Wisconsin, Michigan, Colorado, Georgia and Utah, statutes have been passed which provide that this may be done. These statutes leave the matter to be decided in the sound discretion of the court.

Judge Cooley, in speaking upon this subject, says, "It is also requisite that the trial be public. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which

30—Blackstone's Com. Book III, 73.

the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused, that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether."[31]

The statutes upon the subject usually provide that spectators, especially minors, may be excluded in actions for rape, seduction, abortion, criminal conversation, and the like. Such a statute was passed in England in 1848,[32] and others have been passed there since. The Colorado statute provides that it shall be the duty of the court to exclude persons not officers or connected with the case on the suggestion of counsel that the evidence "will be of such character that unnecessary publicity would operate injuriously on public morals.[33] The Utah statute provides that, "In an action for divorce, criminal conversation, seduction, abortion, rape, or assault with intent to commit rape, the Court may in its discretion exclude all persons who are not directly interested therein, except jurors, witnesses, and officers of the court.[34] And the Wisconsin statute provides substantially the same.[35]

The constitutionality of such statutes has been questioned; and in Michigan the supreme court have declared such a statute unconstitutional.[36] The Michigan statute provided that "When-

31—Cooley on Const. Lim. (6th ed.), § 379.

32—11 and 12 Vict., chap. 42, § 19.

33—Colo. C. C. P. 1891, § 421.

34—Utah Rev. Stats. 1898, § 696.

35—Wis. Stats. 1898, § 4789.

36—People v. Yeager, 113 Mich. 228. In this case the defendant was tried for assault with intent to commit rape. The trial court excluded from the court-room all persons not legitimately interested in the case, but announced that any friend or person that was connected or related to or interested in the defendant himself was not to be excluded. "I don't propose," says the court, "to have the court-room filled up with people here to embarrass witnesses in this case. . . . I have told the officer not to let anybody in here who is not either a friend of the complaining witness or of the defendant. He will ascertain that fact as they ap-

ever it shall appear that, upon the trial of any cause, evidence of licentious, lascivious, degrading or peculiarly immoral acts or conduct, will probably be given, the judge presiding at such trial may, in his discretion, require and cause every person, except those necessarily in attendance thereof, to retire and absent himself or herself from the court-room during such trial, or any portion thereof."[37] The Michigan constitutional provision reads as follows: "In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury."[38] According to the better view, however, such statutes do not violate the *spirit* of the constitutional provisions and therefore should be sustained.

In an early decision in Illinois the court held, in a capital case, that "The constitution of this State has guaranteed a public as well as an impartial trial to persons accused; and the closing of the doors of a court-room, to prevent confusion arising from noise and disturbance, when ingress and egress are not prevented, or for a temporary purpose, where existing circumstances eminently require it to be done, but not for the purpose of excluding any one connected with the trial, does not render the trial private, and ought not to be objected to."[39]

§ 14. Sequestration of witnesses. Origin of the rule.—The custom of separately examining witnesses had its origin in very early times. The earliest recorded instance of it seems to be Daniel's vindication of Susanna, an account of which is given in the apocryphal Scriptures. Susanna, wife of Joacim, was coveted by two elders, but she repulsed them. In revenge they plotted her downfall and charged her with adultery. Daniel had the two elders put far apart and examined each separately. One testified that Susanna's alleged offense took place under a

ply for admission. All such people will be admitted, and the public will be kept out." And the officer was directed by the court to see that the order was enforced.

In commenting upon the decision of the Supreme Court in this case Professor Wigmore characterizes it as "deplorable." Wigmore on Evid., Vol. III, p. 2378, note. See also the elaborate opinion by Chief Justice Champlin in People v. Murray, 89 Mich. 276, 28 Am. St. Rep. 294, and the interesting note in the latter citation, pp. 308, 309.

37—Mich. Stats. 1893, Act 408, § 18.

38—Mich. Const., Art. 6, § 28.

39—Stone v. The People, 2 Scam. (Ill.) 326, 327.

mastick tree, and the other testified that it occurred under an *holm* tree. Thus, Daniel "convicted the two elders of false witness by their own mouth." And the record further informs us that "From that day forth was Daniel had in great reputation in the sight of the people." This Scriptural instance of separating witnesses has been referred to many times. Lord Chief Justice Jeffreys refers to it in the trial of the notorious perjurer Oates. In reply to a question by the defendant he says, "as you know the perjury of the elders in the case of Susanna was by their different testimony in particular circumstances discovered."[40] Perhaps the earliest recorded instance of the custom in England occurred in the early part of the fourteenth century. The record says, "The justices immediately called the four witnesses before them and examined each of them separately as to the making, sealing, and place and time, how and when, and other necessary circumstances touching the deed."[41]

§ 15. **Reason for the rule.**—The chief reason for separating witnesses is to secure truthful and unbiased testimony. As said in a recent decision by Chief Justice McClellan, "The purpose to be subserved in putting witnesses under the rule is that they may not be able to strengthen or color their own testimony, or to testify to greater advantage in line with their bias, or to have their memories refreshed, sometimes unduly, by hearing the testimony of other witnesses; and it is legitimate argument against the veracity or fairness of a witness to say that his testimony has been developed along the lines of his inclination in the case by the opportunities he has had, from hearing the other witnesses, to refute them or to amplify his own statements to meet the exigencies of the trial."[42] The same idea is contained in the following statement by Justice Freeman: "The object being to prevent the witnesses with feelings interested from being prepared to meet the statements of witnesses already made, and to compel them to rely on their own memory for the accuracy of their statements without being warped or influenced in their

40—Oates' Trial, 10 How. St. Tr. 1079, 1158 (1685).

41—*Anon.*, Pl. Ab. 351, col. 1, London.

42—Louisville & N. R. Co. v. York, 128 Ala. 305, 30 So. Rep. 676 (1902).

statements by what they have already heard deposed."[43] And also in the following statement by Justice Kirkpatrick: "The less a witness hears of another's testimony, the more likely he is to declare his own knowledge simply and unbiased."[44]

§ 16. Discretion of the court. The early English rule. The modern rule.—According to the early English doctrine, the separation of witnesses is not demandable as of right, but rests in the sound discretion of the court.[45] And by the great weight of authority this view still obtains.[46] In a few jurisdictions, however, it has been repudiated.[47]

§ 17. Same. The better view.—Upon principle, as well as upon grounds of public policy, the separation of witnesses should be demandable as of right. Every opportunity possible should be afforded an adversary to expose perjury, and to separate the witnesses is both feasible and simple. The right of an adversary to demand the separation of the witnesses who are called to testify against him is entitled to the same recognition as his right to cross-examine them. In the event of any combination on their part to commit perjury, his right to have them examined separately would be a powerful weapon of defence. Moreover, the object of trials is to elicit truth in order that justice may be done; but the practice of allowing witnesses to testify in the presence of each other often results in defeating justice. As said by Justice Sneed, "The lawyer who has practiced long in jury cases cannot have failed to observe that the practice of permitting witnesses to hear each other's testimony has often resulted in a great and gross abuse of public justice. Human nature is frail, and that frailty is as often illustrated in the witness box as elsewhere. The witness in an excited litigation often becomes the mere partisan of the litigant whose cause he represents. . . . He has heard the evidence of his own

43—Wisener v. Maupin, 2 Baxt. (Tenn.) 342, 357.

44—State v. Zellers, 7 N. J. L. 226 (1824).

45—Vaughan's Trial, 13 How. St. Tr. 485, 494 (In this case Lord Chief Justice Holt says, "You cannot insist upon it as your right, but only a favor that we may grant.").

46—Com. v. Thompson, 159 Mass.; Errissman v. Errissman, 25 Ill. 119; People v. Considine, 105 Mich. 149, 63 N. W. Rep. 196; McClelan v. State, 117 Ala. 140, 23 So. Rep. 653.

47—Shaw v. State, 102 Ga. 660, 29 S. E. Rep. 477; Watts v. Holland, 56 Tex. 54; Nelson v. State, 2 Swan (Tenn.) 237, 257.

party in regard to the transaction, and perhaps he remembers it somewhat differently; but a conflict would be fatal, and he often reasons his flexible conscience into the opinion that his own memory is at fault and the statement of his confederate is the true version; and he therefore corroborates it. He has heard the testimony of the adverse party, and his ingenuity is taxed at once to strike it where it is vulnerable and to destroy it; a brief and whispered conference behind the bar, and he finds one of his own party who saw the transaction as he saw it; and the thing is done. . . . The object of the trial is to elicit truth; but under such circumstances and in an excited controversy the truth is as often smothered as disclosed. . . . This doctrine that upon the mere motion or suggestion of a party it does not seem a matter of right (to order the separation of the witnesses) appears to be traceable to the darker ages of English jurisprudence. We have no hesitation in declaring that such a doctrine cannot stand the test of principle, and that it is utterly incompatible with the perfect enjoyment of the right of a fair trial guaranteed by the laws to the citizens of this country."[48]

§ 18. **Exceptions to the rule.**—The rule relating to the separation of witnesses is subject to certain exceptions. Thus, it is not applicable to the parties to the suit.[49] This exception obtains both in civil and criminal cases. The basis of it is the right of parties litigant to be present during the trial. Thus, in a civil case in which the trial court required the plaintiff to go out of the court room and remain out until he was examined as a rebutting witness, and in which an appeal was taken, Justice Frazer says, "This proceeding is probably without a precedent. The right of a party litigant to be present during the trial of his cause, that he may be heard in his own behalf, has been so long accorded by universal custom, and is so obviously necessary for the security of private rights, that the refusal to entertain the cause at all would scarcely be a greater error than the denial of this privilege."[50] Where the guardian of a minor de-

48—Rainwater v. Elmore, 1 Heisk. 363, 365.

49—McIntosh v. McIntosh, 79 Mich. 198, 203, 44 N. W. Rep. 592; State v. Kelly, 97 N. C. 404.

50—Larue v. Russell, 26 Ind. 386, 387.

fendant is a witness, he is entitled to claim this privilege.[51] Where two persons are jointly tried for the same crime, and they announce their intention to testify as witnesses, each for himself, neither may be placed under the rule and excluded from the court room during the examination of the other.[52] This is owing to the fact that the constitution guarantees to every defendant in a criminal prosecution the right to be present at every stage of the trial.[53] Attorneys in the case are also entitled to assert this privilege.[54] And agents of a party to the suit, whose presence is essential to advise counsel, should not be excluded. Justice Monks says, "It is within the discretion of the trial court to except from the order directing a separation of the witnesses any agent, director or managing officer of a corporation who is a witness in the cause and whose presence is essential to advise counsel so as to enable them to properly conduct the cause."[55] Where counsel for the defendant in a criminal prosecution request that one of the two officers who made the arrest be excluded from the court room during the time that the other is testifying, a refusal on the part of the court to grant the request is not error.[56] And it has been held that expert witnesses should be allowed to hear the testimony upon the subject concerning which they are to testify.[57]

§ 19. **Penalty for violating the court's order.**—All the courts agree that where a witness violates an order of the court to withdraw from the court room he may be punished for contempt. Whether the court may exclude him or not from testifying is a question upon which there is some conflict. According to some decisions the court may exercise its discretion in the matter.[58] This rule obtains in Illinois.[59] The violation of the order by the witness certainly should not disqualify him.

51—Cottrell v. Cottrell, 81 Ind. 87.

52—Richards v. State, 91 Tenn. 723, 30 Am. St. Rep. 907.

53—Cooley's Constitutional Limitations 390.

54—Powell v. State, 13 Tex. App. 244; State v. Ward, 61 Vt. 153, 179, 17 Atl. Rep. 483.

55—The Zenia Real Est. Co. v. Macy, 147 Ind. 568, 577.

56—People v. Machen, 101 Mich. 400.

57—Johnson v. State, 10 Tex. App. 571.

58—Grant v. State, 89 Ga. 396, 15 S. E. Rep. 49; The People v. Burns, 67 Mich. 537.

59—Bulliner v. The People, 95 Ill. 394.

As said by Justice Scholfield, "If witnesses, after an order of separation, upon being spoken to by third parties in violation of an order of court, would become thereby disqualified to testify, a wide door would be opened to unscrupulous friends of those charged with crime to disqualify all material prosecuting witnesses.[60] According to the better view, if the party who calls the witness is without fault, and the witness violates the order of the court, the party who calls him should not be deprived of his testimony. As said by Justice Coffey, "The rule to be deduced from these cases is that, when a party is without fault and a witness disobeys an order directing the separation of the witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility."[61] And comments by counsel upon the misconduct of the witness, with the view of impeaching his credibility, are perfectly proper.[62]

§ 20. **Refreshing present recollection vs. adopting past recollection.**—Refreshing a present recollection and adopting a past recollection are separate and distinct ideas. Courts, however, have frequently lost sight of this distinction and this oversight has resulted in much confusion in the decisions. Recollection, by which is meant the mental reproduction of impressions originally obtained by observation or some other source of knowledge, comprises the following two classes: (1) Present recollection; and (2) Past recollection.

§ 21. **Refreshing present recollection.**—For the purpose of refreshing his present memory a witness may examine memoranda. Where the examination is made for this purpose it is immaterial by whom, or when, the memoranda were made. In this case, the memoranda themselves are, as a rule, inadmissible. After making the examination, the witness testifies independently of them. As said by Lord Chief Justice Ellenborough, "If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient, and it makes no difference that the memorandum is not written by himself, for it is not the memorandum that is evidence, but the recollection of

60—Bulliner v. The People, *supra*.

61—Taylor v. The State, 130 Ind. 66, 70.

62—Grimes v. Martin, 10 Ia. 347; McHugh v. State, 42 Ohio St. 154, 158.

the witness."[63] This statement has frequently been quoted by courts with approval. To the same effect is the following statement by Justice Fields: "It was competent for him to use the declaration or any other paper for the purpose of refreshing his memory upon the subject."[64] And the following statement by Justice Jewett: "It is well settled that he is permitted to assist his memory by the use of any written instrument; and it is not necessary that such writing should have been made by himself, or that it should be an original writing, providing after inspecting it he can speak to the facts from his own recollection."[65] And also the following statement by Justice Earl: "A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and when his memory is thus refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence."[66] In the same case Justice Earl also says, "Memoranda may be used in other cases which do not precisely come under either of the foregoing heads. A store of goods is wrongfully seized, and an action is brought to recover for the conversion. There are thousands of items. No witness could carry in his mind all the items and the values to be attached to them. In such a case, a witness may make a list of all the items and their values, and he may aid his memory while testifying by such list. He must be able to state that all the articles named in the list were seized, and that they were of the values therein stated, and he may use the list to enable him to state the items. After the witness has testified, the memorandum which he has used may be put in evidence, not as proving anything itself,

63—Henry v. Lee, 2 Chitty 124.

64—Dunlop v. Berry, 5 Ill. 327.

65—Huff v. Bennet, 6 N. Y. 337. (In this case the witness refreshed his memory by inspecting a newspaper report.) See also Erie, etc., Co. v. Miller, 52 Conn. 444, 52 Am. Rep. 607. (In this case the court say: "The doctrine established by the authorities seems to be that if the witness, afer looking at the paper, to recall the facts, can speak from his own recollection of them, and not merely because they are stated or referred to in the paper, his evidence will be admissible notwithstanding the manner in which his recollection was revived, and no matter when or by whom the paper was made, nor whether it be original or a copy, or an extract nor whether referred to by the witness in court or elsewhere.")

66—Howard v. McDonough, 77 N. Y. 592.

but as a detailed statement of the items testified to by the witness."

§ 22. Same. Right of opposing counsel and the jury to inspect the memorandum.—Although a memorandum which is used by a witness merely to refresh his memory is not, as a general rule, admissible in evidence, the opposing counsel have the right to inspect it and to cross-examine him upon it. Moreover, the jury also have the right to inspect it. The purpose, of course, is to test the veracity of the witness. As said by Chief Justice Cooley, "The other party had a right to know what the memorandum was on which he relied, and whether it had any legitimate tendency to bring the fact in controversy to mind. It would be a dangerous doctrine which would permit a witness to testify from secret memoranda in the way which was permitted here. . . . The defendant was entitled to see it at the time in order to test the candor and integrity of the witness."[67] And as said by Lord Chief Justice Tenterden, "You put the paper into the witness' hands to refresh his memory. It is very usual for the opposite counsel to see it and examine upon it, and I think he has a right to see it."[68] And as said by Justice Endicott, "The opposite party is entitled to cross-examine the witness in regard to it; and it may be shown to the jury, not for the purpose of establishing the facts therein contained, but for the purpose of showing that it could not properly refresh the memory of the witness."[69]

It is held, however, that cases arise where it is not essential to produce the memorandum. Russell says, "A witness, to assist his memory, may use a written entry, if it were made by himself shortly after the occurrence of the fact to which it relates; but if he cannot speak to the fact from recollection any further than as finding it entered in a book or paper, such book or paper ought to be produced, and if not evidence, the testimony of the witness amounts to nothing."[70] Greenleaf, in discussing this question, divides the cases in which writings may be referred to by witnesses to refresh or supplement their recollection into the following three classes: "*First.* Where the

67—Duncan v. Seeley, 34 Mich. 369.

68—Rex v. Ramsden, 2 C. & P. 603.

69—Com. v. Jeffs, 132 Mass. 5.

70—2 Russell on Crimes 622

writing is used only for the purpose of assisting the memory of the witness. In this case it does not seem necessary that the writing should be produced in court, though its absence may afford matter of observation to the jury, for the witness at last testifies from his own recollection. *Second.* Where the witness recollects having seen the writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers, that at the time he saw it, he knew the contents to be correct. In this case the writing itself must be produced in court in order that the other party may cross-examine. . . . *Third.* Where the writing in question neither is recognized by the witness, as one which he remembers to have before seen, nor awakens his memory to the recollection of any thing contained in it, but nevertheless knowing the writing to be genuine, his mind is so convinced that he is on that ground enabled to swear positively to the fact."[71] Elliott says, "If a witness, before going into court, has his memory refreshed by referring to a memorandum in his possession, it is not necessary that the memorandum be brought into court, because the witness in such case really makes a statement from memory. The fact that the writing is not produced may, however, affect the weight of the testimony."[72] And Justice McIver says, "Where a memorandum or other writing is referred to by a witness simply to refresh his memory, and it is not proposed to use such memorandum or writing as testimony, but to rely entirely upon the recollection of the witness as refreshed by such memorandum or writing, there can be no necessity for producing the same in court."[73] But where a witness refreshes his memory by examining a memorandum in court, it is very generally held that opposing counsel have the right to inspect it and cross-examine him upon it; and also that the jury have the right to examine it. As said by Lord Chief Justice Eyre, "It is always usual and very reasonable, when a witness speaks from memorandums, that the counsel should have an opportunity of looking at those memorandums, when he is cross-examining that witness."[74]

71—1 Greenleaf on Evid., § 436.

72—2 Elliott on Evid., § 868.

73—State v. Collins, 15 S. C. 373, 377, 40 Am. Rep. 697, 702. (In this case employees in a hospital testified, in a capital case, to certain matters as within their recollection, refreshed by referring to the contemporaneous records of the hospital.)

74—Hardy's Trial, 24 How. St. Tr. 824.

§ 23.—**Adopting a past recollection.**—Not only may a witness use memoranda to refresh his present memory, but he may also adopt memoranda as a record of past recollection. In the former case he testifies independently of the memoranda, in which case the memoranda themselves, as previously stated, are usually inadmissible. In the latter case his testimony is based upon the memoranda which are themselves admissible. In the former case he swears to an actual present recollection. In the latter case he swears to recorded facts because of his confidence in the correctness of the memoranda. As said by Chief Justice Simpson, "The rule upon this subject, in its broadest outline, embraces two classes of cases: first, where the witness, after referring to the paper, speaks from his own memory and depends upon his own recollection as to facts testified to; second, where he relies upon the paper and testifies only because he finds the facts contained therein."[75] And as said by Justice Rowell, "Nor was it necessary that the witness should have had an independent recollection. . . The old notion that the witness must be able to swear from memory is pretty much exploded. All that is required is that he be able to swear that the memorandum is correct. There seem to be two classes of cases on this subject: (1) Where the witness by referring to the memorandum has his memory quickened and refreshed thereby, so that he is enabled to swear to an actual recollection; (2) Where the witness after referring to the memorandum undertakes to swear to the fact, yet not because he remembers it, but because of his confidence in the correctness of his memorandum. In both cases the oath of the witness is the primary substantive evidence relied upon; in the former the oath being grounded on actual recollection, and in the latter on the faith reposed in the verity of the memorandum."[76] In the latter case it is essential that the memorandum was made at or about the time the events recorded therein occurred, and that it be verified and adopted by the witness as a record of past recollection. It is not essential, however, that the memorandum was written by the witness himself. As said by Lord Chief Justice Ellenborough, "If the witness looked at the log-book from time to time, while the occurrences mentioned were recent and fresh in his memory, it

75—Bank v. Zorn, 14 S. C. 444. 76—Davis v. Field, 56 Vt. 426.

is as good as if he had written the whole with his own hand."[77] And as said by Chief Justice Le Grand, "What was supposed to be the ancient rule has been relaxed by more recent decisions; and now it is held not to be necessary that the memorandum should have been made by the witness, but . . . the witness having then seen it and recognized it as containing the truth, of which he is still convinced at the time of the trial, he may be examined in regard to it."[78] This principle has been recognized very frequently, both in England and in this country.[79] In a few cases, however, the contrary has been incorrectly held.[80]

Where the witness adopts the memorandum as a record of past memory, the original memorandum, if available, must be produced and not merely a copy of it. The reason for this rule is, the original is the best evidence of what in fact was recorded. Moreover, the adversary is entitled to have such evidence produced, if available, as it affords him the best means of testing the veracity of the witness. But where the original is lost, or for some other reason unavailable, a copy may be used.[81] Where the original is not accounted for, a copy will be excluded;[82] and also a copy of a copy.[83]

Not only has the adversary the right to inspect the memorandum or copy, but he also has the right to cross-examine the witness on it. As said by Justice Mullin, "If the witness cannot be compelled to produce it, he might use documents made for him by the party calling him, of the accuracy of which he knows nothing. . . The right of a party to protection against the introduction against him of false, forged, or manufactured evidence, which he is not permitted to inspect, must not be in-

77—Burrough v. Martin, 2 Camp. 112.

78—Green v. Caulk, 16 Md. 573.

79—Anderson v. Whalley, 3 C. & K. 54; Clark v. Bank, 164 N. Y. 498, 58 N. W. Rep. 659 (1900); Hazer v. Streich, 92 Wis. 505, 66 N. W. Rep. 720; Union Cent. L. I. Co. v. Smith, 119 Mich. 171, 77 N. W. Rep. 706.

80—Morrison v. Chapin, 97 Mass. 72; Schmidt v. Wambacher, 62 Ga. 323; Wellman v. Jones, 124 Ala. 580, 27 So. Rep. 416.

81—Clifford v. Drake, 110 Ill. 135; Chicago & A. R. Co. v. American Strawboard Co., 190 Ill. 268, 60 N. E. Rep. 518; Smith v. Scully, 66 Kan. 139, 71 Pac. Rep. 249.

82—Amor v. Stoeckele, 76 Minn. 180, 78 N. W. Rep. 1046.

83—Green v. Caulk, *supra.*

vaded a hair's breadth."[84] And as said by Justice Patterson, "If he could not recollect the facts independently of the writing, the original writing ought to have been in court in order that the other party might cross-examine; not that such writing is to be made evidence itself, but that the other party is to have the benefit of the witness refreshing his memory in every part."[85]

§ 24. **An unorthodox doctrine.**—In a few jurisdictions, including New York, it has been held that an indispensable preliminary to the introduction of memoranda to be used as evidence of a *past* recollection, is inability on the part of the witness, with the aid of the memoranda, to speak from *present* memory concerning the facts.[86] This doctrine has also been followed in the United States courts.[87] Upon principle, however, it is fallacious, and in most jurisdictions repudiated.

§ 25. **Effect of suspicious circumstances.**—The circumstances connected with the making of a memorandum may arouse sufficient suspicion to justify its exclusion. Thus, where it has been tampered with by the party calling the witness, or by his attorney, this fact may justify excluding it. And where it was made so long after the alleged facts occurred as to raise a presumption that the memory of the witness at that time was probably very dim concerning them, it may for this reason be excluded. In all such cases, however, the matter rests in the sound discretion of the court.[88]

§ 26. **Enforced inspection of memoranda.**—Where a witness declines to inspect his memoranda to refresh his memory when in doubt he may be required to do so. This is also a matter which rests in the sound discretion of the court. As said by Chief Justice Shaw, "There may be cases undoubtedly, in which it would be a great hardship upon a witness to require him to qualify himself, so to speak, to testify, by reference to

84—Tibbetts v. Sterberg, 66 Barb. (N. Y.) 201.

85—Rex v. St. Martin's, 2 Ad. & El. 210.

86—Russell v. Ry. Co., 17 N. Y. 134; People v. McLaughlin, 150 N. Y. 365, 44 N. E. Rep. 1017; Jaques v. Horton, 76 Ala. 243; Weaver v. Bromley, 65 Mich. 214, 31 N. W. Rep. 839.

87—Vicksburg Ry. Co. v. O'Brien, 119 U. S. 99.

88—Bergman v. Shoudy, 9 Wash. 331, 37 Pac. Rep. 453; Schuyler, etc., Bank v. Bollong, 24 Neb. 821, 825.

papers and documents in his power; as when it would subject him to much trouble or expense, or involve any breach of confidence, of duty or of honorary obligation, or unreasonably disclose a knowledge of his own affairs. But there are other cases, in which it would lead to an entire perversion and frustration of the purposes of justice, if a witness could not be required to refresh his memory, and prepare himself to testify, by an examination of papers in his own custody or power, or when they are produced at the trial. As where a mate of a vessel, who had kept his cargo book, or an inspector of elections his tally list, or a clerk in a warehouse his memorandum of the receipt and delivery of goods, they may testify with great accuracy by the aid of their memoranda, but very imperfectly, or not at all, without. And multitudes of similar cases might be suggested. Suppose these witnesses, from malice or caprice, or still worse, from a desire to favor the adverse party, should refuse to examine their memoranda; the rights of life, liberty, property or reputation, public and political, as well as private, civil and social rights, might be affected and put in jeopardy. It would be hardly going beyond the principle contended for, to say that an attesting witness, called to prove a will or deed, if he chose to close his eyes and refuse to look at the instrument, might not be required to look at it, and thus qualify himself to say whether he attested it or not. . . It is a question of sound judicial discretion, for the judge at the trial, to direct how the examination shall be conducted; and he will be governed in this respect, by a view to the rights of the parties and the furtherance of justice, having due regard to the rights of the witness, under all the circumstances of the case."[89]

§ 27. **The right to begin. The order of examination.**—For a discussion of the right to begin the introduction of evidence see § 17, at page 20 of this volume.

The examination of a witness may be said to comprise four stages. These four stages are as follows: (1) The examination-in-chief by the party who calls him; (2) The cross-examination by the adverse party; (3) The re-examination by the party who calls him; and (4) The re-cross examination by the adverse party. It often happens, however, that the fourth stage

89—Chapin v. Lapham, 37 Mass. 467, 472, 473.

is omitted. Sometimes the third stage is also omitted and occasionally the second. The court may, in its discretion, recall a witness for further examination;[90] but the party who produces him cannot, as a matter of right, claim this privilege.[91]

It is also to be observed that, although a party who begins to introduce his evidence must, as a general rule, continue until the whole of it is given, before the adverse party may introduce any, yet this regular order of proof may be, and frequently is, departed from by the court. The court, however, is not bound in any case to allow a departure from the regular order of procedure. It is a matter which rests solely in its discretion. As said by Justice Story, "If every party had a right to introduce evidence at any time, at his own election, without reference to the stage of the trial in which it is offered, it is obvious that the proceedings of the court would often be greatly embarrassed, the purpose of justice be obstructed, and the parties themselves be surprised by evidence destructive of their rights, which they could not have foreseen or in any manner have guarded against. It seems to us, therefore, that all courts ought to be, as indeed they generally are, invested with a large discretion on this subject, to prevent the most mischievous consequences in the administration of justice to suitors."[92] And as said by Judge Mills, "In strict practice, he who has the affirmative ought to introduce all the evidence to make out his side of the issue; then the evidence of the negative side is heard; and finally the rebutting proof of the affirmative, which closes the examination. In doing this, neither side ought to be permitted to give evidence by piecemeal, then to apply for instructions, and again to mend and add to this proof, until, by repeated experiments, he shall come up to the opinion of the court. An adherence to these rules, generally, will be found necessary in all courts of original jurisdiction; and without them, confusion, loss of time, captious and irritable conduct must follow. We say generally, for it will often be found necessary for the presiding judge, for good reasons, to depart from them to attain complete justice, and when they ought or ought not to be varied must, in a good meas-

90—Wiliamson v. Yingling, 93 Ind. 42, 48.

91—Nixon v. Beard, 111 Ind. 137, 12 N. E. Rep. 131.

92—Philadelphia & T. Ry. Co. v. Stimpson, 14 Pet. (U. S.) 448, 462.

ure, be left to the sound discretion and prudence of the court, and a court of error ought never to interfere for such departure, except where injustice is done by it."[93]

§ 28. **The examination-in-chief.**—After the witness has been sworn or affirmed the attorney of the party who called him proceeds to examine him. This is done by submitting to him a series of questions. The purpose of this examination is to elicit from the witness and present before the court and jury material facts of the case of which he has knowledge. Of necessity, the examination, in a large measure, is under the control of the presiding judge. As said in one case, "A circuit judge presiding at a trial is not a mere moderator between contending parties; he is a sworn officer, charged with grave public duties. In order to establish justice and maintain truth and prevent wrong, he has a large discretion in the application of rules of practice, and his action in this respect will not be reversed by this court, unless it exhibits an abuse of discretion resulting in injustice."[1] Within certain limits he may prescribe the manner and scope of the examination. Thus, in the exercise of a sound discretion, he may prevent the examination from being needlessly protracted;[2] exclude evidence which is merely cumulative;[3] prevent the witness from going beyond proper limits in giving his testimony;[4] prevent counsel from asking the witness irrelevant questions;[5] and also prevent needless interruptions by opposing counsel.[6] With the view of eliciting the whole truth, he may ask the witness questions himself;[7] and may even call a witness of his own motion and question him. As said by Lord Esher, M. R., in a recent English case, "If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge, in my opinion, is himself entitled to call him; and I cannot agree that such a course has never been taken by a judge

93—Braydon v. Goulman, 1 T. B. Monroe (Ky.) 118.

1—Huffman v. Cauble, 86 Md. 591, 596.

2—Adriance v. Arnot, 31 Mo. 471.

3—Lake Shore, etc., Ry. Co. v. Brown, 123 Ill. 162; Mears v. Cornwall, 73 Mich. 78.

4—State v. Farley, 87 Ia. 22, 53 N. W. Rep. 1089.

5—Skaggs v. State, 108 Ind. 53, 8 N. E. Rep. 695.

6—State v. Scott, 80 N. C. 365.

7—Shaefer v St. Louis, etc., Ry. Co., 128 Mo. 64; Sessions v. Rice, 70 Ia. 306; Palmer v. White, 10 Cush. (Mass.) 321.

before."[8] It is also his province, in the exercise of a sound discretion, to limit the number of witnesses.[9]

As a general rule, immaterial or irrelevant questions are excluded; but where counsel promises to introduce evidence of other facts which will make such questions proper, they are allowed.[10] Where intent or motive is a relevant fact the witness may be questioned concerning it.[11] And where a witness is asked his *impression* as to a certain fact he may give it, provided it is based upon recollection and is not a mere inference or conclusion.[12] And as a reason for his recollection he may state circumstances which impressed the fact in question upon his mind. As said by Justice Ladd, in a breach of promise case in which a material fact in issue was the time of birth of plaintiff's child, "Undoubtedly a witness may state that he had a conversation with another, on the subject inquired about, at a specified time, or mention some collateral circumstances, as a reason for recollecting the fact spoken of."[13] Vague and ambiguous questions are objectionable, and usually are excluded.[14] In the examination of a witness, counsel will not be allowed to assume any material fact in issue, and which is to be found by the jury; or to assume that any particular answer has been given contrary to the fact. And this rule is applicable not only in the examination-in-chief, but also in the cross-examination. As said by Justice McAllister, "The rules of law which govern in the examination of witnesses as effectually prohibit counsel from assuming in their questions any facts which are material to the point of the inquiry, but which are to be ultimately found by the jury, as other rules of law forbid the presiding judge from assuming such facts in his instructions to the jury. In the former case, the reason of such rules does not rest merely upon the consideration that such assumption of facts might mislead

8—Coulson v. Disborough, 2 Q. B. D. (1894) 316.

9—Green v. Phoenix Mut. Life Ins. Co., 134 Ill. 310, 25 N. E. Rep. 583, 10 L. R. A. 576; Barhyte v. Summers, 68 Mich. 341, 36 N. W. Rep. 93.

10—Wyngert v. Norton, 4 Mich. 286.

11—Perry v. Porter, 121 Mass. 522; Forbes v. Walker, 25 N. Y. 430.

12—Blake v. People, 73 N. Y. 586; State v. Flanders, 38 N. H. 324.

13—Stewart v. Anderson, 111 Ia. 330, 332.

14—Hill v. State, 91 Tenn. 521; Bassett v. Shares, 63 Conn. 39.

the witness, but upon that of the liability of such assumption or assertion of facts by counsel becoming a substitute in the minds of jurors for evidence, and thus calculated to mislead them. In the latter case the reason is the same, with the further reason that the assumption by the court in its instructions to the jury of material facts to be found by them, is regarded as an invasion by the court of the peculiar province of the jury. The rules in the former case are so rigidly maintained that they will not permit counsel, even upon cross-examination and when leading questions may be put, to assume any material facts in issue and which are to be found by the jury, or to assume that particular answers have been given contrary to the fact."[15]

§ 29. **Same. Anticipating the defence.**—The pleadings may be such as to justify the plaintiff when introducing his evidence to anticipate the defense and seek to avoid it. As said in a leading English case, "When affirmative pleas of justification are put on the record with the general issue, the plaintiff's counsel may, if they please, not only prove the facts of the declaration, but also may, in the first instance, and before the defendant's case is gone into at all, go into any evidence which goes to destroy the effect of the justifications by way of anticipating the defense; or, if they please, content themselves with proving the fact on the general issue, and then close their case, leaving the defendant to make out his justifications as he can, and afterwards go into evidence in reply as to the justifications. But if the plaintiff's counsel, knowing by the pleas what the defense is to be, close their case, and trust to evidence in reply, they are to be restricted to such evidence as goes exactly to answer the case proved, or attempted to be proved by the defendant, in support of the justifications, and they cannot be allowed to go beyond it."[16] This rule obtained at common law, and it is very generally recognized to-day both in England and in this country. It is to be observed, however, that where the plaintiff introduces evidence with the view of anticipating the defense he is usually precluded from introducing further evidence upon that matter by way of rebuttal. As said by Justice Merrick, "The plaintiff knew from the answer what was to be the

15—Haish v. Munday, 12 Bradw. (Ill.) 539, 545, 546. See also, 1 Greenleaf on Evid. § 434; 1 Starkie on Evid., star page 188.

16—Pierpont v. Shopland, 1 Car. & Payne 447.

nature of the defence. He chose to attack, and, if he could, to disprove it, in advance of any evidence offered in relation to it by the defendant; and he was permitted to do so by the court. No restraint whatever appears to have been put upon him in this course of proceeding. This justly precluded him from the right, without the permission of the court, of introducing, in reply, and at the close of the trial, merely cumulative evidence to the same point."[17] And as said by Justice Bigelow, "The plaintiff, in proving his *prima facie* case, offered evidence to show that the words alleged to be slanderous were not spoken under circumstances which would bring them within the rule touching privileged communications. He was not bound to do this; but, in the exercise of his own discretion, he saw fit thus far to anticipate the defence. Having thus opened this part of the case, and introduced as much evidence respecting it as he deemed expedient, he could not afterwards claim, as a matter of right, to accumulate testimony upon the same point. It was then a mere matter of discretion, with the judge who presided at the trial, to admit or reject the evidence, to the exercise of which no exception can be taken. 1 Greenl. Ev. §§ 74, 431, Browne v. Murray, Ry. & Mood. 254. As a general rule in the conduct of trials, if a party elects to proceed in the first instance with proof to anticipate the defence, he should not afterwards be allowed to offer evidence on the same point, in reply to the case made by the testimony of the defendant. To permit a party thus to divide his case leads to confusion, and gives him an unfair advantage over his adversary."[18]

§ 30. **The cross-examination. Its importance.**—The second stage in the examination of a witness is the cross-examination. After the examination-in-chief is finished the witness is turned over to opposing counsel for cross-examination. This right is an exceedingly important one, and its importance has been frequently emphasized. Justice Richardson says, "The defendant's cross-examination expresses well the searching process and practical test furnished and intended by this rule of law. . . Experience has proved that it is, of all others, the most effective, the most satisfactory, and the most indispens-

17—Holbrook v. McBride, 70 Mass. 215, 218, 219.

18—York v. Pease, 68 Mass. 282, 283, 284.

able test of the evidence narrated on the witness' stand. . . I know of no disagreement, among the expounders of evidence, upon the importance of cross-examination."[19] Justice Ruffin says, "All trials proceed upon the idea that some confidence is due to human testimony, and that this confidence grows and becomes more steadfast in proportion as the witness has been subjected to a close and searching cross-examination; and this because it is supposed that such an examination will expose any fallacy that may exist in the statement of the witness, or any bias that might operate to make him conceal the truth; and trials are appreciated in proportion as they furnish the opportunities for such critical examinations."[20] Justice Nisbet says, "I have been thus particular in planting the power of cross-examination upon a foundation laid in authority, because of the sacred character of that right. The power of cross-examination is the most efficacious test which the law has devised for the discovery of truth. . . The right to be confronted with the witness, and to sift the truth out of the mingled mass of ignorance, prejudice, passion, and interest, in which it is very often hid, is among the very strongest bulwarks of justice."[21] Professor Wigmore says, "it is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience. . . Striking illustrations of its power to expose inaccuracies and falsehoods are plentiful in our records; and it is apparent enough, in some of the great failures of justice in Continental trials, that they could not have occurred under the practice of effective cross-examination."[22] And Greenleaf says, "The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious tests, which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties, and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain

19—State v. Campbell, 1 Rich. L. 126.

20—State v. Morris, 84 N. C. 764.

21—McCloskey v. Leadbetter, 1 Ga. 551, 555.

22—Wigmore on Evid., Vol. II, § 1367.

knowledge of the facts to which he bears testimony, and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanor, and of determining the just weight and value of his testimony. It is not easy for a witness, who is subjected to this test, to impose on a court or jury; for however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended."[23]

§ 31. **Same. Its dangers.**—It is to be observed, however, that, in the hands of an unskillful person, a very important instrument may prove to be an exceedingly dangerous weapon. This is true of the legal engine of cross-examination. As said by Reynolds, "Cross-examination is a most powerful weapon in the hands of the skillful advocate, but likewise a very dangerous one to be trifled with by a person who does not understand how to manage it, as it is a matter of every-day occurrence for a witness who has utterly failed to establish by his testimony in chief the facts that he has been called to prove, to be completely rehabilitated by an injudicious cross-examination."[24] And as said by Sergeant Ballantine, "If the principles upon which cross-examination ought to be founded are not understood and acted upon it is worse than useless, and it becomes an instrument against its employer."[25] Wendell Phillips says, "You can do anything with a bayonet—except sit upon it." And Professor Wigmore says, "A lawyer can do anything with a cross-examination,—if he is skillful enough not to impale his own cause upon it."[26]

§ 32. **Same. Scope of the cross-examination.**—Whenever a witness is examined in chief, opposing counsel is entitled to cross-examine him. If the witness should die, or otherwise become incapacitated so as to prevent his cross-examination, evidence given by him in his direct examination must be excluded. The reason for the rule is, *ex parte* statements are too unreliable to be considered in the investigation of controverted facts, and

23—1 Greenleaf on Evid., § 446.

24—Reynolds on Evid. (3rd ed.) § 124.

25—"Some Experiences of a Barrister's Life," pub. by H. Holt & Co., N. Y., 1882, p. 104.

26—Wigmore on Evid., Vol. II, § 1367, p. 1698.

should not therefore be received as evidence.[27] Justice Grover says, "Mrs. Adams was sworn and examined in chief, and upon such examination gave material evidence against the prisoner, and before the prisoner had had any opportunity for cross-examination, fainted away, and after rallying therefrom, became so severely ill as to render her cross-examination impossible. . . This evidence may have injured the prisoner; and if incompetent against him, his request that it should be struck out and withdrawn from the jury should have been complied with. The question presented is of rare occurrence, upon which there has been but little judicial authority. . . The rule of the civil law is different."[28] According to the English rule, if a witness has been *intentionally* sworn he may be cross-examined even though he has not been examined in chief.[29] The rule, however, is held not to apply where the witness is called merely to produce a document, or in order to be identified. In this country the English rule has been substantially followed in a few jurisdictions, including Michigan and Massachusetts; but in most jurisdictions, including Illinois, it has been repudiated.[30] Justice Champlin says, "In England the rule is that when any witness has been examined in chief, or has been intentionally sworn, the opposite party has a right to cross-examine him, except when the witness was called merely to produce a document on a *subpoena duces tecum,* or in order to be identified; and this rule has been substantially adopted in Massachusetts and other of the American states. It has been substantially acted upon in practice in this state. We had occasion to remark upon the scope allowed upon cross-examination in the case of People v. Barker, 60 Mich. 277, 302 (27 N. W. Rep. 539). It is therefore no reason for rejecting or striking out the cross-examination of a witness that he has not given any testimony in chief, or that his testimony in chief has been stricken out."[31]

27—Kissam v. Forrest, 25 Wend. 651.

28—People v. Cole, 43 N. Y. 508. See also to same effect, People v. Hayes, 140 N. Y. 484, 494.

29—Dickinson v. Shee, 4 Esp. 67; Rex v. Brooke, 2 Stark. 409.

30—Bonnet v. Glattfeldt, 120 Ill. 166; Fulton v. Bank, 92 Pa. St. 112; Miller v. Miller, 92 Vt. 510; Johnson v. Wiley, 74 Ind. 233, 237; Phila., etc., Ry. Co. v. Stimpson, 14 Pet. (U. S.) 448.

31—Turnbull v. Richardson, 69 Mich. 400, 416, 417. See also, Blackington v. Johnson, 126 Mass. 21; State v. Sayers, 58 Mo. 585; Mask v. State, 32 Miss. 405. For

Reynolds says, in his Americanized edition of Stephen's Digest of Evidence, "If a witness dies, or becomes incapable of being further examined [before an opportunity for his cross-examination has been afforded to the party against whom his evidence is to be used, the testimony already given must be excluded.] If in the course of a trial a witness who was supposed to be competent appears to be incompetent, his evidence may be withdrawn from the jury, and the case may be left to their decision independently of it."[32]

Where a witness is called merely to prove the attestation of a document, and his examination-in-chief is confined to this point, some courts hold that his cross-examination is also to be confined to this;[33] while other courts hold that he may be cross-examined upon the whole case.[34] The former view is usually considered the better one.[35]

According to the English rule, when a witness testifies to a single fact in his examination-in-chief he may be cross-examined upon the whole case.[36] This view obtains in a few jurisdictions in this country,[37] but it is not the better view and is contrary to the general American rule. According to the American rule, his cross-examination must be confined to matters brought out in his direct examination.[38] This view obtains in Illinois. As said by Chief Justice Walker in an early case, "It seems to be the well recognized rule, that when a witness is called by one party, the other has only the right to cross-examine upon the facts to which he testified in chief. If he can give evidence beneficial to the other party, he should call him at the proper time, and make him his own witness and examine him in chief, thereby

a collection of cases holding this view see 1 Wharton on Evid., § 529 and note.

32—Reynolds' Stephen on Evid. (3rd. ed.) Art. 126.

33—Fulton v. Cent. Bank, 92 Pa. St. 112; Gale v. People, 26 Mich. 157.

34—Blackington v. Johnson, *supra*, Lamprey v. Munch, 21 Minn. 329.

35—Ellmaker v. Buckley, 16 Sarg. & Rawle (Pa.) 72, 77.

36—Mayor v. Murray, 19 L. J. (ch.) 281.

37—Hay v. Reid, 85 Mich. 296; Blackington v. Johnson, *supra;* Sands v. Southern Ry. Co., 108 Tenn. 1, 64 S. W. Rep. 478; Huntsville, etc., Ry. Co. v. Corpening, 97 Ala. 681.

38—Halley v. Gregg, 82 Ia. 622, 48 N. W. Rep. 974; Helser v. McGrath, 52 Pa. St. 531; Simons v. Busby, 119 Ind. 13; Sauntry v. United States, 117 Fed. Rep. 132; Welcome v. Mitchell, 81 Wis. 566.

giving the other party the benefit of a cross-examination on such evidence in chief. Otherwise, the party calling the witness would be deprived of a cross-examination as to evidence called out by the other side, and the party against whom the witness was first called, would obtain the advantage of getting evidence under the latitude allowed in a cross-examination."[39] And as said by Justice Thornton, "Though there are authorities to the contrary, the rule established in this State is, that when one party introduces a witness and examines him, the cross-examination is limited to the facts elicited by the examination in chief. If his testimony is desired as to other and distinct matters, the opposite party must call him, and make him his own witness."[40] And as said by Justice Craig, in a case in which a witness had been called simply to prove a handwriting, "When a witness is called to prove a single fact, the opposite party, under the guise of a cross-examination, can not enter upon a general examination of the witness, but the cross-examination must be confined to the examination in chief. This rule, we apprehend, is well established by the authorities."[41] Whether a particular question, submitted in cross-examination, is within the scope of the examination-in-chief, is a matter for the trial court to decide; and as a general rule, courts of review are slow to interfere with the exercise of this discretion.[42] Even under the American rule, the cross-examination may include questions the answers to which may tend to rebut or modify inferences or conclusions growing out of the examination-in-chief.[43] And, as generally understood, it is not restricted to the specific matter brought out in the examination-in-chief, but may extend to the general subject thereof[44] as said by Elliott, "The American rule, however, as generally understood and applied, does not necessarily prevent the cross-examination from going into matters and facts connected with the matters stated in the direct examination.

39—Stafford v. Fargo, 35 Ill. 481, 486.

40—Bell v. Prewitt, 62 Ill. 362, 367.

41—Hurlbut v. Meeker, 104 Ill. 541, 543.

42—Bailey v. Bailey, 94 Ia. 598, 63 N. W. Rep. 341; Neil v. Thorn, 88 N. Y. 270.

43—Central Ry. Co. v. Allmon, 147 Ill. 471; Thomas v. Miller, 151 Pa. St. 482; Gilmer v. Higley, 110 U. S. 47.

44—Eames v. Kaiser, 142 U. S. 488; Washburn v. Chicago, etc., Ry. Co., 184 Wis. 251, 54 N. W. Rep. 504.

. . There is some apparent conflict upon this proposition, and some courts are inclined to limit the cross-examination to the specific subject or phase of the general subject gone into on the examination-in-chief, but the rule, as we have stated it, is supported by the weight of authority and the better reasons."[45]

§ 33. **Same. Witness called by court.**—As stated in § 28 of this chapter, the presiding judge may, of his own motion, call a witness and question him. In such a case, counsel of neither party can claim as a matter of right the privilege of cross-examining the witness. If, however, the evidence given by such witness be adverse to either party, the latter should be allowed to cross-examine the witness upon such evidence. As said by Lord Esher, M. R., "When a witness is called in this way by the judge, the counsel of neither party has a right to cross-examine him without the permission of the judge. The judge must exercise his discretion whether he will allow the witness to be cross-examined. If what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers. A general fishing cross-examination ought not to be permitted."[46] And as said by Lord Justice Smith in the same case, "A witness called in this way is the witness of the judge, not of either of the parties. It is the function of the judge to try and find out the truth, whether he is hearing the case with or without a jury. Neither party can cross-examine a witness so called as of right; the leave of the judge must first be obtained." Moreover, the presiding judge, in examining a witness, called either by himself or by a party to the suit, may ask him leading questions.

§ 34. **Same. Leading questions.**—One of the advantages of cross-examination, which does not usually obtain in the examination-in-chief, is the privilege of counsel to ask leading questions. Questions are said to be leading which are put in such a way as to suggest to the witness the answers expected or desired. They are allowable in cross-examination upon all matters in reference to which the witness may be cross-examined. According to the English rule he may be asked leading questions touching entire-

45—Elliott on Evid., Vol. 2, § 920.

46—Coulson v. Disborough, L Q. D. (1894) 316, 318.

ly new matter, provided it be relevant to the issue. According to the American rule, however, he may not be questioned at all outside of his direct examination, except where the purpose is to impeach his credibility.

By the use of leading questions a witness can be restricted in his answers to yes or no; and owing to this fact he may be frequently surprised into admitting the truth of facts which he has denied in his examination-in-chief, and *vice versa*.

§ 35. **Same. Preliminary examinations by the court.**—It is usually held that as regards preliminary examinations of witnesses by the court, to determine questions relating to the competency of witnesses, and the admissibility of certain testimony, such as confessions, dying declarations, secondary evidence, and the like, the adverse party is not entitled as a matter of right to cross-examine the witnesses, except where the evidence is to go to the jury. Thus, in a trial for robbery, counsel for defendants requested that a preliminary examination be instituted to determine the question of the admissibility of certain confessions alleged to have been made by the defendants. The request having been granted, counsel for defendants claimed the right to cross-examine the witnesses on this preliminary issue; but the presiding judge ruled that as matter of law no such cross-examinations could be allowed. In sustaining this ruling, Chief Justice Chapman says, "The purpose of such an examination is to satisfy the judge whether the evidence is admissible. Upon the request being made, it was for him to direct the course of the examination; and he might, if he thought proper, direct the prosecuting officer to conduct it. The defendants' counsel had no legal right to conduct it contrary to the direction of the judge; and the extent to which it should be carried, and its effect upon the admissibility of the confessions, were to be decided by the judge. It is not alleged that the right of cross-examination was abridged when the evidence was offered to the jury."[47] Some cases, however, hold that even where the evidence is addressed to the court and not to the jury instances arise where the right of cross-examination exists. Thus, in an Illinois case in which it was sought to introduce secondary evidence of the contents of an execution which was alleged to have

47—Com. v. Morrell, 99 Mass. 542.

been lost, and in which an affidavit of the clerk of the circuit court and another person was introduced to prove this fact, Justice Thornton says, "We think that the clerk of the circuit court and Mrs. Porter should have been produced as witnesses, and examined in the ordinary mode. It is no answer to say, that these persons did not make affidavit as to any issue of fact. It is true, their evidence was addressed to the court, and not to the jury, but the determination of the court, as to the loss of the execution and the alleged diligent search, was a matter of deep interest to appellants. On that, the case hinged, as appears from the record. They should have had the privilege to cross-examine the affiants, as to the assumed fact of the loss of the execution and the character of the search. The following cases indicate the correctness of this rule: Rankin v. Crow, 19 Ill. 626; Whitehall v. Smith, 24 Ill. 166."[48] And in an early Massachusetts case the court say, "The affidavit of a party, on the question of loss of paper, may be admitted to exclude any presumption that he may have it in his possession; but those who may be admitted as witnesses must testify in the usual form, in order that the advantage of cross-examination may be preserved."[49]

§ 36. **Impeachment of witnesses.**—The subject of impeachment is an important branch of the examination of witnesses. Some quite vexatious questions are connected with it, and concerning some of its phases the decisions are very conflicting. The rules which govern the impeachment of one's own witnesses are very different from those which govern the impeachment of the adversary's witnesses.

§ 37. **Same. Impeachment of one's own witness.**—It has often been said that a party may not impeach his own witness. The chief reason for this rule was stated by Francis Buller a century ago, and this reason has been adopted by leading authors, including Greenleaf,[50] Best[51] and Wharton.[52] Buller says, "a party never shall be permitted to produce general evidence to discredit his own witness, for that would be to enable him to destroy the witness if he spoke against him, and to make him a

48—Becker v. Quigg, 54 Ill. 390, 395.

49—Poignard v. Smith, 8 Pick. (Mass.) 272.

50—1 Greenleaf on Evid., § 443.

51—2 Best on Evid., § 645.

52—1 Wharton on Evid., § 549.

good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him."[53]

A party who puts a witness upon the stand presents him to the court as worthy of credit, and, as a general rule, he will not be permitted to discredit him.[54] There are, however, exceptions to this rule. Thus, where a party is obliged to call a particular witness, as for instance the subscribing witness to a will, he may impeach directly his credibility.[55] And where the party who called the witness is taken by surprise by his evidence, some decisions hold that the former may call other witnesses to show by them inconsistent statements of the witness made previously.[56]

The party who calls a witness may always impeach his credibility indirectly. And he may do this by other witnesses. Upon this point Wharton says, "In this country, while a party cannot ordinarily discredit his own witnesses, his right to prove a case inconsistent with that stated by such witness is unquestioned, even though this discredit the witness incidentally."[57] Justice Breese says, "The rule is, if a witness state facts against the interest of the party calling him, another witness may be called by the same party to disprove those facts, for such facts are evidence in the cause, and the other witness is not called directly to discredit the first, but the impeachment of his credit is incidental, only, and consequential."[58] And Justice Campbell says, "There is nothing in any known rule of evidence to prevent a party from contradicting his own witnesses, and it would be a very dangerous thing to introduce such a rule. Every one would then be at the mercy of his own witnesses, and if the first witness sworn should swear against him he would lose the testimony of all the rest. This would be a perversion of justice."[59]

Where a witness, who has been called by one of the parties to the suit, is subsequently called by the adverse party, the former

53—Buller N. P. 297.

54—Coulter v. Am. Merch. U. Ex. Co., 56 N. Y. 585.

55—Brown v. Bellows, 4 Pick. (Mass.) 179; Harden v. Hays, 9 Pa. St. 151; 1 Greenleaf on Evid. § 443.

56—State v. Benner, 64 Me. 267; Campbell v. State, 23 Ala. 45.

57—Wharton on Evid. § 549.

58—Rockwood v. Poundstone, 38 Ill. 199, 201.

59—Snell v. Gregory, 37 Mich. 500, 501, 502.

party cannot impeach him directly, either by general evidence or by proof of contradictory statements out of court.[60]

§ 38. **Same. Party calling witness surprised. His right to show inconsistent statements made out of court.**—It frequently happens that the party who called the witness is taken by surprise by his evidence. The question then arises whether he may question him as to inconsistent statements made by the witness out of court; and, if he denies making such statements, whether other witnesses may be called to contradict him. All the courts agree that the witness himself may be questioned as to his previous inconsistent statements out of court for the purpose of refreshing his memory; and also to explain the attitude of the party who called him. If the witness deny having made such inconsistent statements, some courts hold that he may not be contradicted by the party who called him for the reason that he is not allowed to impeach directly his own witness. While other courts recognize in a case of this kind an exception to the general rule. Chief Justice Fuller says, "When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness. As to witnesses of the other party, inconsistent statements, after proper foundation laid by cross-examination, may be shown; Railway Company v. Arterz, 137 U. S. 507; but proof of the contradictory statements of one's own witness, voluntarily called and not a party, inasmuch as it would not amount to substantive evidence and could have no effect but to impair the credit of the witness, was generally not admissible at common law. Best Ev. § 645; Whart. Ev. § 549; Mellmish v. Collier, 15 Q. B. 878.

By statute in England and in many of the States, it has been provided that a party may, in case the witness shall in the opinion of the judge prove adverse, by leave of the judge show that he has made at other times statements inconsistent with his present testimony, and this is allowed for the purpose of counteracting actually hostile testimony with which the party has been

60—Coulter v. Am. Merch. U. Ex. Co., *supra.*

surprised. Adams v. Wheeler, 97 Mass. 67; Greenough v. Eccles. 5 C. B. (N. S.) 786; Rice v. Howard, 16 Q. B. D. 681."[61] And Justice Rapallo says, "The further question has frequently arisen whether the party calling the witness should, upon being taken by surprise by unexpected testimony, be permitted to interrogate the witness in respect to his own previous declarations, inconsistent with his evidence. Upon this point there is considerable conflict in the authorities. We are of the opinion that such questions may be asked of the witness for the purpose of probing his recollection, recalling to his mind the statements he has previously made, and drawing out an explanation of his apparent inconsistency. This course of examination may result in satisfying the witness that he has fallen into error and that his original statements were correct, and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Though the answers of the witness may involve him in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry. Proof by other witnesses that his statements are incorrect would have the same effect, yet the admissibility of such proof cannot be questioned. It is only evidence offered for the mere purpose of impeaching the credibility of the witness, which is inadmissible when offered by the party calling him. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credibility. In case he should deny having made previous statements inconsistent with his testimony, we do not think it would be proper to allow such statements to be proved by other witnesses; but where the questions as to such statements are confined to the witness himself, we think they are admissible. As a matter of course, such previous unsworn statements are not evidence, and when the trial is before a jury that instruction should be given."[62]

According to the better view a party who has been surprised by his own witness who denies having made inconsistent statements previously, may show such inconsistent statements by other witnesses; and in England and in many of the states stat-

61—Hickory v. United States, 151 U. S. 303, 309.

62—Bullard v. Pearsall, 53 N. Y. 230, 231, 232.

utes have been enacted in harmony with this view. It is probable that the weight of modern authority is to the same effect. Mr. Freeman, however, says, "The weight of authority would appear to be against the right to prove inconsistent statements by other witnesses."[63] And Mr. Best holds this view.[64] But Dr. Greenleaf says, "The weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify, or that the witness had recently been brought under the influence of the other party and has deceived the party calling him."[65] For an excellent review of the authorities, and many of the state statutes, see an elaborate note on the subject generally in 21 L. R. A. 418. See also, 16 Cent. Law Journal, 325; Am. Law Rev., 261; 60 Am. Dec., 751; and the reference given in foot-note 22.

§ 39. **Impeachment of a witness of the adverse party.**—A witness may be impeached in the following ways: (1) By disproving by other witnesses statements by him material to the issue; (2) By proving by other witnesses inconsistent statements previously made by him; (3) By introducing evidence derogatory to his character for truth and veracity; and (4) By exhibiting the improbability of his statements by a skillful cross-examination.

§ 40. **Same. Disproving by other witnesses material statements.**—A very common way for an adversary to impeach a witness is by disproving his statements by other witnesses. And, as heretofore indicated (§ 37), even the party who calls the witness may impeach him indirectly in this way.

§ 41. **Same. Proving by other witnesses inconsistent statements previously made.**—A witness may be impeached by showing by other witnesses inconsistent statements previously made by him. Before this can be done, however, the attention of the witness must be called to such statements in order that he may be afforded an opportunity to explain or qualify them. His attention should be called specifically to the person to whom they were made and the time and place. Wharton says, "In order

63—82 Am. St Rep. 59.
64—2 Best on Evid. § 645.
65—1 Greenleaf on Evid., § 444.

to discredit a witness in this way, it is generally necessary to first ask him on cross-examination, whether or not he has made such prior contradictory statement, specifying the person to whom such alleged statement was made, and as far as possible, the time and place."[66] Chief Justice Scholfield says, "It is very clear the ruling of the court was erroneous. Parker, in his examination, did not have his attention directed to either of these conversations, and the rule is inflexible, that a witness can not be impeached by proof of his having made contradictory statements out of court, unless his attention has been directed, on his examination, to those contradictory statements, specifying particularly, time and place."[67] And as said by Chief Justice Walker, "The record in this case fails to show, that the proper foundation was laid to impeach John Horwitz, by contradicting his evidence. The question propounded to him was, whether he told Hellman that he had sold out to avoid trouble with his creditors. There was neither time nor place named, or any other circumstance referred to, calculated to direct the attention of the witness to the conversation about which the inquiry is made. Until this was done, the law will not permit a witness to be contradicted. This would be permitting a witness to be entrapped, when the law requires that he should be treated fairly. If, after his attention has been particularly called to the conversation, in which the statement is supposed to have been made, and the witness denies making the statement, then he may be contradicted."[68]

It has been contended that statements by a witness may not be contradicted unless *intentionally* false. This contention, however, is erroneous. It has also been contended that such state-

66—Wharton on Evid., § 555.

67—Richardson v. Kelly, 85 Ill. 491, 493. See also, Root v. Wood, 34 Ill. 283; Winslow v. Newlan, 45 Ill. 145.

68—Miner v. Philips, 42 Ill. 123, 130. To the same effect are the following: Williamson v. Peel, 29 Ia. 458 ("The credibility of a witness can be impeached by proof of contradictory statements, only after laying a proper foundation by asking the witness in reference to the time and place thereof."); Downer v. Dana, 19 Vt. 338. ("It is, indeed, an established rule of practice in this state that testimony of this kind cannot be received to impeach a witness produced upon the stand, unless an opportunity be first afforded to the witness, whose testimony it is proposed to impeach, to explain or qualify the imputed declarations.")

ments may not be contradicted unless *material* to the issue. This contention is also erroneous. As said by Justice Sheldon, "There is no legal warrant requiring, as conditions affecting the credibility of the witness, that the testimony so contradicted should be material to the issue and intentionally false, as asserted by the instruction. Testimony may affect the party against whom it is adduced whether it be true or false, and if false, whether it be so intentionally or unintentionally; and evidence of contradictory statements by the witness giving the testimony tends to affect his credibility, whatever be the character of the testimony so contradicted, in these respects. It is true that a witness can not be contradicted as to matters purely collateral, but where contradictory statements, by a witness in a matter collateral, are suffered to be proved without objection, such evidence being in the case, tends, as we conceive, to affect the credibility of the witness, and may be so considered and weighed by the jury."[69] It is to be observed, therefore, that where the adverse party in cross-examining a witness asks an irrelevant question he is concluded by the witness' answer; but where irrelevant matter is brought out in the *direct* examination the testimony may be contradicted. This important distinction, however, is frequently overlooked.

§ 42. **Same. Attacking the character of the witness for truth and veracity.**—A witness may be impeached by introducing evidence derogatory to his character for truth and veracity. The general reputation of the witness for truth and veracity may always be shown. In some jurisdictions his general moral character may be shown.[70] In others, including Illinois, it may not.[71] In an early Illinois case Justice Trumbull says, "The

69—Craig v. Rohrer, 63 Ill. 325, 326. See also, Schell v. Plumb, 65 N. Y. 592 ("The question presented must be settled by the application of certain rules of evidence, which are well settled. A party has the right, for the purpose of discrediting the testimony of an adverse witness, to prove statements made by him contradicting the testimony given, after the requisite examination of the witness in regard to such statement."); Com. v. Beau, 111 N. Y. 438; Peck v. Ritchie, 66 Mo. 114; Schlater v. Winpenny, 75 Pa. St. 321.

70—Mitchell v. State, 94 Ala. 68, 10 So. Rep. 518; State v. Shroyer, 104 Mo. 441, 24 Am. St. Rep. 748; People v. Silva, 121 Cal. 668, 54 Pac. Rep. 146.

71—People v. Abbott, 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W.

authorities are uniform that it is only the general reputation of a witness that can be inquired into, for the purpose of impeaching his testimony; and although there is some conflict in the decisions, as to whether the inquiry should be confined to the general character of the witness for truth and veracity, we think the better rule is, that it should be so confined."[72] And Justice Scholfield, after quoting Justice Trumbull's statement, adds, "This doctrine has been frequently referred to with approval in subsequent cases, and in no instance questioned."[73] There are many decisions on either side of this question. Mr. Freeman says, "There is a marked conflict of authority on the question as to whether, in proving character, the party is limited to the witness' character for truth and veracity, or whether he can show what his general moral character is. There is no doubt that his general reputation for truth and veracity may be shown, for this goes directly to discredit his testimony. . . . In a number of jurisdictions, however, the rule is well settled that, in proving the general reputation of a witness, the evidence should be limited to showing his reputation for truth and veracity, and that it is improper to allow inquiries relative to his general moral character. . . . In fully as many jurisdictions the rule is equally well established that you may not only inquire as to a witness' reputation for truth and veracity, but his general moral character may be shown. A witness' whole moral character may be attacked, and a party is not limited to showing his bad reputation for truth and veracity (citing numerous cases on both sides.)"[74]

The credibility of a witness, however, may not be impeached by proving, by *other witnesses, particular acts* of immorality. Upon this point the decisions are quite harmonious.[75] Chief

Rep. 862; Atwood v. Impson, 20 N. J. Eq. 150; Rudsdill v. Slingerland, 18 Minn. 380. (In this case the court say that the only object in inquiring into the character of a witness is for the purpose of ascertaining whether he is a truthful person or not. And for this reason inquiries concerning his general reputation should be confined to his reputation for truth and veracity.)

72—Frye v. Bank of Illinois, 11 Ill. 366, 379.

73—Dimick v. Downs, 82 Ill. 570, 573.

74—82 Am. St. Rep. 29 (1898).

75—Rhea v. State, 100 Ala. 119, 14 So. Rep. 853; State v. Rogers, 108 Mo. 202, 18 S. W. Rep. 976;

Justice Scholfield says, "The reputation of a witness can not be impeached by proof of particular acts; it must be by proving his general reputation for truth and veracity to be bad."[76] The reason assigned for this rule is, that although a person is presumed to be able at all times to defend his general reputation, he is not presumed to be ready on the spur of the moment to disprove particular acts. As said by Chief Justice Breese, "Every man is presumed to be ready at all times to defend his general character, but not his individual acts—of those he must have due notice."[77]

It is to be observed, however, that, while the rule prohibits proof of particular acts by other witnesses, some courts hold that, in the discretion of the trial court, evidence of such acts may be brought out on the cross-examination of the witness. Thus, in the trial of a man charged with assaulting a woman, for the purpose of impeaching the credibility of the prosecutrix, and also for the purpose of showing that she had a mania for telling false stories of assaults made upon her by other persons, the defendant offered to show that she had told false stories of how her parents had assaulted her, made her lie with a goat in the cellar, had scalded her and driven her from home, and how the authorities of the Tewksbury Almshouse had attempted to strangle her with a sheet and kill her with medicine, and had strangled infants there. The trial court excluded the evidence; and the court of review say, "The purpose for which the excluded evidence was offered, as appears by the bill of exceptions, and has been assumed in the argument for the dependants, was not to prove insanity, but to prove a lying habit of mind or a propensity to lie; the evidence offered was only that the witness had lied on other occasions, which would present collateral issues, and was not competent as independent evidence; and it does not appear that it was offered by way of cross-examination of the witness, nor, if it was, that the defendant sought to have it admitted in the discretion of the judge."[78] And according to the New York rule a witness may be asked, upon cross-examina-

76—Gifford v. People, 87 Ill. 39, 40.

People v. Dorothy, 156 N. Y. 237, 50 N. E. Rep. 800; Griffith v. State, 140 Ind. 163, 39 N. E. Rep. 440.

77—McCarty v. People, 51 Ill. 231, 232.

78—Com. v. Kennon, 130 Mass. 210, 214.

tion, whether or not he has ever been in jail or state prison, and how much of his life he has passed in such places."[79] According to the Texas rule a witness may be asked upon his cross-examination any question which tends to test his truth and veracity, however irrelevant to the facts in issue, and however disgraceful to himself, provided the answer does not tend to expose him to a criminal charge.[80] The decisions upon this subject, however, are in irreconcilable conflict. In some jurisdictions a witness upon cross-examination cannot be compelled to answer questions which merely tend to degrade him, and do not affect his credibility.[81] This rule obtains in Illinois.[82] In some jurisdictions the matter rests in the sound discretion of the court.[83]. If, however, the matter elicited is material to the issue, the witness must answer however disgraceful his answers may be.[84] It has been held that a witness, upon his cross-examination, may refuse to answer whether he has a loathsome disease;[85] whether he is a chronic litigant;[86] whether he is a deserter from the army;[87] whether he has been expelled from church;[88] whether he is an insolvent debtor;[89] whether he is a street loafer and general bum;[90] at what saloon he loafs, and how much he pays for whiskey.[91] It has also been held that the fact that a witness has no religious belief has no bearing upon his credibility.[92] But a witness may be impeached by showing that when the facts sworn to occurred he was intoxicated.[93] And his general reputation for truth and veracity may always be shown.[94]

79—Real v. People, 42 N. Y. 270.

80—Carroll v. State, 32 Tex. Cr. Rep. 431, 40 Am. St. Rep. 786, 24 S. W. Rep. 100.

81—Penn. Co. v. Bray, 125 Ind. 229, 25 N. E. Rep. 439.

82—Yoe v. People, 49 Ill. 410.

83—People v. Noelke, 94 N. Y. 137, 46 Am. Rep 128.

84—Clementine v. State, 14 Mo. 112.

85—Herod v. State (Tex.), 56 S. W. Rep. 59.

86—Palmeri v. Manhat. Ry. Co., 133 N. Y. 261, 28 Am. St. Rep. 632, 30 N. E. Rep. 1001.

87—Gulf, etc., Ry. Co. v. Johnson, 83 Tex. 628, 19 S. W. Rep. 151.

88—People v. Dorthy, 46 N. Y. Supp. 970, 20 App. Div. 308.

89—Smith v. Brockett, 69 Conn. 492, 38 Atl. Rep. 57.

90—Houston, etc., Ry. Co. v. White, 23 Tex. Civ. App. 280, 56 S W. Rep. 204.

91—Drye v. State (Tex. Cr.), 55 S. W. Rep. 65.

92—People v. Copey, 71 Cal. 548, 12 Pac. Rep. 721.

93—Tuttle v. Russell, 2 Day 201, 2 Am. Dec. 89.

94—Foulk v. Eckert, 61 Ill. 318.

§ 43. **Same. Hayward's case.**—Young Hayward was tried for murder. The evidence showed that the alleged crime consisted in the killing of a saloon keeper, the difficulty between the accused and the saloon keeper growing out of a dispute about a game of cards they had played together. The parties had been playing cards and drinking together in deceased's saloon. The dispute between them culminated in the shooting of the saloon keeper by the accused upon the street near the saloon. The accused was a witness in his own behalf. A material fact in issue was, whether or not the accused was the aggressor in the affair upon the street. He was a medical student in Chicago where the killing occurred, and had always borne a good character in the neighborhood from which he came for being peaceable and inoffensive. On his cross-examination the presiding judge ruled that he should answer questions touching his habits, and his testimony thus elicited showed that he had frequented other saloons in the city where he had drank liquor, and played cards and billiards on divers occasions. He was convicted and sentenced to penitentiary for life. In delivering the opinion of a majority of the supreme court, Chief Justice Dickey says, "Looking further into the record we find that, on cross-examination of the accused when on the stand as a witness, the court compelled him, against objections interposed, to testify that he had frequented other saloons in Chicago and drank, and played cards and billiards on divers times at other saloons in Chicago. This, we think, was error, and may have prejudiced some of the jurors against the accused. We can not perceive that these circumstances had any legitimate bearing upon the issue in the case, or that they were competent as bearing upon the credibility of the accused."[1]

§ 44. **Same. Impeachment of prosecutrix in a rape case.**—The fact that the prosecutrix in a rape case had been guilty of previous acts of unchastity, or had a bad general reputation for unchastity, is no defense to the crime of rape. But evidence is admissible to show such facts since they are material upon the question of her consent. All courts hold that her general reputation for unchastity may be shown, provided such general reputation existed prior to the commission of the offense charged. Evidence of a bad general reputation acquired subsequently is

1—Hayward v. The People, 96 Ill. 492, 502, 503.

inadmissible.[2] As to the admissibility of testimony relating to specific acts of intercourse on her part the decisions are in hopeless conflict. In England, and in some jurisdictions in this country, she may be asked whether or not she had prior connection with men other than the defendant; but she may decline to answer.[3] If she answers in the negative, she may not, according to the English rule, be contradicted.[4] This rule, however, has been repudiated in this country.[5] In some jurisdictions in this country she may not be questioned as to specific acts with other men, but she may be as to prior acts with the accused.[6] In Illinois, and in some other states, she may be compelled to answer, upon cross-examination, whether or not she had prior intercourse with other men.[7] And evidence of habitual unchastity with other men promiscuously is held admissible.[8] Evidence is admissible to show that the prosecutrix had, prior to the alleged rape, given birth to an illegitimate child.[9] But evidence of the bad character of her parents is inadmissible.[10]

The fact that the prosecutrix had prior connection with the accused may be shown by her own declaration.[11]

After impeaching evidence has been introduced against the prosecutrix, it may be rebutted by introducing evidence of her good character.[12]

§ 45. **Same. Impeachment by showing indictment, arrest or conviction.**—The decisions upon this subject are not at all harmonious. Many decisions hold that a witness, whether he be the defendant or not, may be compelled to answer on cross-examination whether or not he has ever been indicted or arrested.[13] There are, however, many which hold the contrary.[14]

2—State v. Forshner, 43 N. H. 89.

3—Rex v. Holmes, 12 Cox C. C. 137.

4—Rex v. Holmes, *supra.*

5—Strang v. People, 24 Mich. 1.

6—Cons. v. Harris, 131 Mass. 336; Bessette v. State, 101 Ind. 85; Shartzer v. State, 63 Md. 149.

7—Shirwin v. People, 69 Ill. 55; Rogers v. People, 34 Mich. 345.

8—Hall v. People, 47 Mich. 636; Woods v. People, 55 N. Y. 515; Rex v. Martin, 6 Car. & P. 562.

9—Wilson v. State, 17 Tex. App. 525.

10—State v. Anderson, 19 Mo. 241.

11—State v. Cook (Ia.), 22 N. W. Rep. 675.

12—McCain v. State, 57 Ga. 390; People v. Tyler, 36 Cal. 522.

13—Ellis v. State, 152 Ind. 326, 52 N. E. Rep. 82; Leland v. Kauth, 47 Mich. 508; Hill v. State, 42 Neb. 503, 60 N. W. Rep. 916.

14—People v. Irving, 95 N. Y. 541; State v. Brown, 100 Ia. 50,

By the weight of authority, a witness may be compelled to state upon his cross-examination whether or not he has been convicted of an infamous crime.[15] Some decisions, however, hold the contrary.[16] As a general rule, parol evidence is inadmissible to show this fact by other witnesses.[17] The record of the conviction is the best evidence.

In most jurisdictions a witness may be compelled to state, upon his cross-examination, whether or not he has ever been in penitentiary or in jail, and how long he was there.[18] This may be done even where the conviction for a crime must be shown by the record.[19]

§ 46. **Same. Mode of proving general reputation.**—Before a witness is allowed to state the general reputation of a person, he must show that he is qualified to speak. He should first be asked, therefore, if he has knowledge of that person's general reputation in the neighborhood in which he lives. As said by Chief Justice Walker, "It is a rule of evidence that the witness should be asked, first, whether he is acquainted with the general character of the person intended to be impeached, for truth and veracity, in his neighborhood, and the impeaching witness must state that he knows what character he bears before he can be asked as to what that character is. This rule is so elementary that it would be useless to refer to authorities in its support. It is presumed that all practicing lawyers know it to be the rule."[20] Having answered the first question in the affirmative, the witness is then asked to state whether that general reputation is good or bad. If he replies that it is bad, he may then be asked, whether from his knowledge of that reputation, he would believe him under oath.[21]

The impeaching witness must have personal knowledge of the

69 N. W. Rep. 277; McKisson v. Sherman, 51 Wis. 303, 8 N. W. Rep. 200.

15—Real v. People, 42 N. Y. 270; Ellis v. State, *supra;* State v. Taylor, 118 Mo. 153, 24 S. W. R. 449.

16—Newcomb v. Griswold, 24 N. Y. 298; Ryan v. People, 79 N. Y. 593; Marx v. Hilsendegen, 46 Mich. 336, 9 N. W. Rep. 439.

17—Real v. People, *supra;* State v. Miller, 100 Mo. 606, 622, 13 S. W. Rep. 1051.

18—

19—State v. Taylor, 118 Mo. 153, 24 S. W. Rep. 449.

20—Foulk v. Eckert, 61 Ill. 318, 319.

21—Knight v. House, 29 Md. 194, 96 Am. Dec. 515; Nelson v. State, 32 Fla. 244, 13 So. Rep. 361.

general reputation of the person sought to be impeached,[22] but it is not essential that he be personally acquainted with him.[23] It has been held, however, that where the impeaching witness had been sent into the neighborhood in which the party formerly lived for the express purpose of learning his character the former was not qualified to speak.[24] The fact that the impeaching witness has heard a *few* persons say that they would not believe the party under oath does not qualify him;[25] on the other hand, it is not essential for him to know what a *majority* of the party's neighbors say of him.[26] The mere personal opinion of the impeaching witness does not qualify him to speak;[27] but to gain personal knowledge it is not essential that he be a resident of the immediate locality where the other party resides.[28]

Greenleaf says that an impeaching witness may not be asked whether he would believe a certain other witness under oath. The fallacy of this statement, however, is shown in an early Michigan case.[29] By the great weight of American authority this question may be asked.

It is also to be observed that the impeaching witness may, and should, be subjected to a rigid cross-examination. This feature has been emphasised by Justice Cooley.[30]

§ 47. **Same. Weight to be given impeaching evidence.**—The weight to be given the evidence of an impeaching witness is a matter for the jury to determine. The same rules govern in determining the weight to be given such evidence as in the case of an ordinary witness. As said by Justice Magruder, in the celebrated Spies' case, "The defense introduced nine witnesses, living in Chicago, for the purpose of impeaching Gilmer. The prosecution introduced eight witnesses from Iowa, where

22—Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657.

23—State v. Turner, 36 S. C. 534, 15 S. E. Rep. 602.

24—Douglass v. Tousey, 2 Wend. (N. Y.) 352, 20 Am. Dec. 616; Reid v. Reid, 17 N. J. Eq. 101.

25—Houston, etc., Ry. Co. v. White, 23 Civ. App. 280, 56 S. W. Rep. 204.

26—Crabtree v. Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324.

27—Bucklin v. State, 20 Ohio 18; Kitteringham v. Dance, 58 Ia. 632, 12 N. W. Rep. 612.

28—Dupree v. State, 33 Ala. 380, 73 Am. Dec. 422.

29—Hamilton v. People, 29 Mich. 173.

30—People v. Annis, 13 Mich. 511.

Gilmer lived from 1870 to 1879, and ten witnesses from Chicago, where he lived from 1879 to 1886, to sustain his reputation for truth and veracity. Before a witness can say that he will not believe a man under oath, he must first swear that he knows that man's reputation for truth and veracity among his neighbors, and that such reputation is bad. The unwillingness to believe under oath must follow from and be based upon two facts: (1) The fact that the witness knows the reputation for truth and veracity among the man's neighbors. (2) The fact that such reputation is bad. As the reputation must be bad before it can be known to be bad, the most material fact to be proved is that such reputation is bad. What a man's reputation is, is a fact to be proved just as any other fact. Where, as here, eighteen witnesses of standing and credibility swear that a man's reputation is good, while nine of equal standing and credibility swear that it is bad, the jury must determine for themselves whether they will believe the eighteen men or the nine men."[31]

§ 48. **Same. Impeachment by showing bias, hostility, sympathy, etc.**—A witness may be impeached by showing that he entertains bias or hostility toward the adverse party, or sympathy toward the party who calls him. This may be done by showing either his declarations or acts.[32] A witness may not be impeached by showing the falsity of his statements concerning *collateral* facts. This rule is well established.[33] But matters which show bias or hostility on the part of a witness are not considered collateral to the issue, so that as regards such matter he may be contradicted. As said by Justice Scholfield, "As to collateral matters in general, if gone into on cross-examination, the party is bound by the answers of the witness, but the state of feeling of the witness towards the adverse party is held not to be irrelevant (1 Greenleaf on Evidence §450), and hence it is held to be competent to inquire, on cross-examination, whether the witness has not used expressions of animosity or revenge towards the party against whom he bears testimony,

31—Spies v. The People, 122 Ill. 1, 208, 3 Am. St. Rep. 426.

32—Swett v. Shumway, 102 Mass. 365; Carr v. Moore, 41 N. H. 131; Batdorff v. Farmers' Nat. Bank of R., 61 Pa. St. 183.

33—North Chicago St. Ry. Co. v. Southwick, 165 Ill. 494, 46 N. E. Rep. 377; Swanson v. French, 92 Ia. 695, 61 N. W. Rep. 407; Johnson v. Brown, 130 Ind. 534, 28 N. E. Rep. 698.

and if the witness deny that he has, to introduce evidence, to contradict him."[34] Many courts hold that, while the bias or hostility itself may be shown, the details of the trouble between the parties which caused the enmity may not be shown.[35] Some courts, however, hold the contrary.[36] The better view is that such details may be shown in so far as it is necessary to do so in order to determine the extent and nature of the enmity. As said by Justice Berry, "It is further urged that the question was properly excluded because, 'while personal controversy and ill-feeling may be shown, yet the particulars thereof are not inquirable into.' The authorities which we have cited not only do not lay down the rule in this way, but an examination of them will show that the practice is to permit the particulars of the hostility of feeling to be inquired into." See, also, Roscoe, Crim. Ev. 181, 182. The object of this kind of testimony is to show bias and prejudice on the part of the witness for the purpose of leading the jury to scrutinize, and perhaps discredt, the testimony. If testimony of this character is to be received, it should be received in its most effective form, so that the purposes for which it is introduced may be best accomplished. A mere vague and general statement that hostile feeling existed would possess little force. It certainly must be proper to ask what the expression of hostility was, for the purpose of informing the jury of the *extent and nature* of the hostile feeling, so that they may determine how much allowance is to be made for it. An inquiry into particulars beyond what is proper to ascertain the extent and nature of the hostile feeling should not, we think, be allowed, as it would lead to interminable investigations."[37] But facts which of themselves are incapable

34—Phenix v. Castner, 108 Ill. 207, 214. See, to the same effect, Skinner v. State, 120 Ind. 127, 22 N. E. Rep. 115; McGuire v. McDonald, 99 Mass. 49; Helwig v. Lascowski, 82 Mich. 619, 46 N. W. Rep. 1033; Hayes v. Smith, 62 Ohio St. 161, 56 N. E. Rep. 879. (This case holds that this is deemed a well-recognized exception to the rule that a witness may not be contradicted as to a collateral matter.)

35—Polk v. State, 62 Ala. 237; Langhorn v. Com., 76 Va. 1012; Chelton v. State, 45 Md. 564.

36—People v. Webster, 139 N. Y. 73, 34 N. E. Rep. 730; Drum v. Harrison, 83 Ala. 384, 3 So. Rep. 715.

37—State v. Dee, 14 Minn. 27, 29, 30.

of showing hostility or bias may not be inquired into at all.[38] And where the witness admits his hostility the court may exclude testimony of a third party pertaining to statements of the witness indicative of such hostility.[39]

The basis of the hostility is immaterial. It may have resulted from a quarrel pertaining to the subject-matter of the suit, or otherwise.[40] It is essential, however, that the event upon which the hostility is based is sufficiently recent as to raise a presumption that it still exists. But, in the case cited in foot-note [37], the threats which showed the hostility of the witness, and which were held admissible to show such hostility, were made eleven months before the trial.

As a general rule, a proper foundation must be laid before a witness can be contradicted as to the fact of his bias or hostility. This is done by calling his attention to certain statements made by him, or acts done, which show such hostility.[41] The decisions upon this point, however, are conflicting. In a few jurisdictions it is not essential to lay a foundation in any case before contradicting the witness.[42] And in some, in which ordinarily a foundation must be laid, no foundation is required in this case.[43]

Innumerable situations arise which tend to show bias, and great latitude is allowed in the scope of the cross-examination. Thus, it has been held that a witness may be asked, if she has not had improper relations with the defendant;[44] if he has made a

38—Carpenter v. State, 98 Ala. 31, 13 So. Rep. 534.

39—Jennings v. State (Tex. Cr.), 57 S. W. Rep. 642.

40—Beardsley v. Wildman, 41 Conn. 515.

41—Davis v. State, 51 Neb. 301, 70 N. W. Rep. 984; Langhorne v. Com., 76 Va. 1012.

42—Day v. Stickney, 14 Allen (Mass.) 255; Cook v. Brown, 34 N. H. 460.

43—Martin v. Barnes, 7 Wis. 239; People v. Brooks, 131 N. Y. 321, 30 N. E. Rep. 189. (In this case the court say, "there can be no reason for holding that the witness must first be examined as to his hostility, and that then, and not till then, witnesses may be called to contradict him, because it is not a case where the party against whom the witness is called is seeking to discredit him by contradicting him. He is simply seeking to discredit him by showing his hostility and malice; and as that may be proved by any competent evidence, we see no reason for holding that he must first be examined as to his hostility.

44—Martin v. State, 125 Ala. 64, 28 So. Rep. 92.

wager on the result of the case;[45] if the deceased was not her lover;[46] if she has not agreed to pay defendant's attorney fees;[47] whether his compensation is contingent upon a recovery by his client;[48] whether he is to receive a reward in case the defendant is convicted;[49] whether he or his wife has an interest in the subject-matter of the suit;[50] whether, if he testified to certain facts showing that he had been guilty of negligence in operating his engine, he would be discharged.[51] And evidence is admissible to show, an attempt on the part of the witness to bribe;[52] an agreement to suppress testimony for a consideration;[53] and an attempt to persuade a witness for the prosecution to fail to identify the defendant.[54] In fact it may be said that practically any condition, circumstance or statement, which shows bias or hostility of the witness toward the adverse party, and which is not too remote, may be shown to impeach the credibility of the witness. It has been held, however, that the fact that the witness had defaced a picture belonging to the defendant was too uncertain to prove ill-will; and that evidence of such fact is inadmissible to impeach the credibility of the witness.[55] On the other hand, it has been held that the fact that a physician was employed for the express purpose of using him as a witness in the case may be shown to impeach his credibility.[56]

The fact that a witness entertains bias or hostility toward the adverse party to the suit may be shown upon his cross-examination, or by other witnesses.[57]

45—People v. Parker, 137 N. Y. 535, 32 N. E. Rep. 1013.

46—People v. Worthington, 105 Cal. 166, 38 Pac. Rep. 689.

47—Magruder v. State, 35 Tex. Cr. Rep. 214, 33 S. W. Rep. 233.

48—Harrington v. Hamburg, 85 Ia. 272, 52 N. W. Rep. 201.

49—Taylor v. United States, 89 Fed. Rep. 954.

50—Renoux v. Geney, 65 N. Y. Supp. 508.

51—Chicago, etc., Ry. Co. v. Thomas, 155 Ind. 634, 58 N. E. Rep. 1040; Haver v. Cent. Ry. Co., 64 N. J. L. 312, 45 Atl. Rep. 593.

52—State v. McKinstry, 100 Ia. 82, 69 N. W. Rep. 267.

53—Alward v. Oakes, 63 Minn. 190, 65 N. W. Rep. 270; Barkly v. Copeland, 86 Cal. 483, 25 Pac. Rep. 1.

54—Webb v. State (Tex. Cr. App.), 58 S. W. Rep. 82.

55—State v. Punshon, 133 Mo. 44, 34 S. W. Rep. 25.

56—Jones v. Portland, 88 Mich. 598, 50 N. W. Rep. 731.

57—People v. Webster, 139 N. Y. 73, 34 N. E. Rep. 730; Swet v. Shumway, 102 Mass. 365, 3 Am. Rep. 471; People v. Anderson, 105 Cal. 32, 38 Pac. Rep. 513.

§ 49. **Corroboration of witness. Definition.**—A witness may be corroborated as well as impeached." "Corroborating evidence," as defined in a comparatively recent case, "is such evidence as tends, in some degree, of its own strength and independently to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegation or issue, if unsupported, would be fatal to the case; and such corroborating evidence must of itself, without the aid of any other evidence, exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue which it supports, and such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or point in issue."[58]

§ 50. **Same. When corroborative evidence is allowable.**—A witness may always be corroborated by calling other witnesses to testify to the same facts when material to the issue.[59] Where the credibility of a witness has been impeached on cross-examination by contradictory statements made by him previously, he may support his statements made on his direct examination, by explaining on his redirect-examination the inconsistent statements.[60] It is to be observed, however, that before corroborating evidence is admissible to support the credibility of a witness his credibility must first be attacked.[61] Where the character of a witness for truth and veracity has been attacked, rebuttal evidence is always admissible to sustain it.[62] And where the witness is a stranger residing in another state, some cases hold that evidence of his good character is admissible to corroborate him even where his character has not been attacked.[63] Where a witness has been impeached by showing previous contradictory statements, some courts hold that he may

58—Gildersleeve v. Atkinson, 6 N. Mex. 250, 27 Pac. Rep. 477.

59—Green v. Gould, 3 Allen (Mass.) 465; Russell v. Chambers, 31 Minn. 54, 16 N. W. Rep. 458.

60—Bressler v. People, 117 Ill. 422, 8 N. E. Rep. 62; Ferris v. Hard, 135 N. Y. 354, 32 N. E. Rep. 129.

61—Bryant v. Tidgewell, 133 Mass. 86; State v. Patrick, 107 Mo. 147.

62—State v. Nelson, 58 Ia. 203, 12 N. W. Rep. 253; Haley v. State, 63 Ala. 83.

63—Merriam v. Hartford, etc., Ry. Co., 20 Conn. 354, 52 Am. Dec. 344.

be corroborated by evidence of good character,[64] while others hold the contrary.[65] If a witness is charged with the commission of a crime, or admits on cross-examination that he has been indicted for a crime, he may rebut this by stating that he was acquitted of the charge, or that he was innocent.[66] He may not, however, go into the details.[67] Where a sustaining witness is called to prove the good character of a witness who has been impeached his competency must first be established. He must show that he has personal knowledge of the other's character. The same rules govern in this respect as in the case of an impeaching witness.[68] As said by Justice Wilkin, "The evidence of witnesses in support of another witness is only admissible because the general reputation of that other has been assailed, and the rule is, without exception, that the witnesses speaking for or against the one assailed must first state that they know his general reputation,—that is to say ,that they know what is generally said of him by 'those among whom he dwells, or with whom he is chiefly conversant, for it is this, only, that constitutes his general reputation or character.' (1 Greenleaf on Evidence, §461)."[69] Where a witness has been impeached by showing prior inconsistent statements, some courts hold that he may be corroborated by showing other prior statements which are consistent.[70] Upon this point, however, the courts are in hopeless conflict. Many courts hold that this may not be done.[71] This view obtains in Illinois, and is probably supported by the weight of authority. Justice Sheldon says, "This Court, in Gates v.

64—Tonns v. State, 111 Ala. 1, 20 So. Rep. 598; Berryman v. Cox, 73 Mo. App. 67; Stratton v. State, 45 Ind. 468.

65—Webb v. State, 29 Ohio St. 351; State v. Rice, 49 S. C., 418, 61 Am. St. Rep. 816, 27 S. E. Rep. 452; Russell v. Coffin, 8 Pick. (Mass.) 143.

66—Jackson v. State, 33 Tex. Cr. Rep. 281, 47 Am. St. Rep. 80, 26 S. W. Rep. 194, 622.

67—Ryan v. State, 97 Tenn. 206, 36 S. W. Rep. 930.

68—Gifford v. People, 148 Ill. 173, 35 N. E. Rep. 754; Magee v. People, 139 Ill. 138, 28 N. E. Rep. 1077.

69—Magee v. People, *supra.*

70—Hinshaw v. State, 147 Ind. 334, 47 N. E. Rep. 157; State v. Grant, 79 Mo. 113, 49 Am. Rep. 218; Wallace v. Grizzard, 114 N. C. 488, 19 S. E. Rep. 760.

71—Stolp v. Blair, 68 Ill. 541, 543; Dufresne v. Wise, 46 Wis. 290, 1 N. W. Rep. 59; State v. Vincent, 24 Ia. 570, 95 Am. Dec. 753; McKelton v. State, 86 Ala. 594, 6 So. Rep. 301, overruling Sonnebau v. Bernstein, 49 Ala. 168.

The People, 14 Ill. 434, recognized the existence of a conflict of authority upon the question whether the former declarations of a witness, whose credibility is attacked, may be given in evidence to corroborate his testimony. We find the decided weight of authority to be, that proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of a cause, is, as a general rule, inadmissible, even after the witness has been impeached or discredited, and we are satisfied with the correctness of the rule."[72] Some courts make a distinction between the case of an ordinary witness and one who is also a party to the suit. In the latter case, it is held that the witness may not introduce prior consistent statements, for the reason that to allow him to do so would be to permit him to introduce self-serving declarations which would necessarily do much more towards establishing the case itself than sustain his credibility as a witness. As said by Chief Justice Elliott, "The trial court erred in admitting in evidence these declarations of the appellee. In giving an account of the accident the appellee was testifying as to facts and was assuming to state facts. In disproving by his own admissions his statements on the witness stand, the appellant did not merely impeach his credibility, but gave evidence which tended to disprove the facts he assumed to state. The testimony given by the witnesses who testified as to his admissions was not offered or received as impeaching evidence, but as evidence of the admissions of a plaintiff. Where a party makes admissions they are accepted as original evidence, upon the ground that the admissions of a party against his interest are made because they truthfully embody the facts, and they are, therefore, substantive proof of the facts admitted. They relate to the facts themselves as facts, and not merely to the question of the trustworthiness of the party as a witness."[73]

§ 51. **Same. Corroboration of prosecutrix in a rape case.**—In a trial for rape it is always allowable to corroborate the evidence of the prosecutrix by showing that soon after the commission of the alleged offense she made complaint. It is generally held, however, that the details of the complaint are in-

72—Stolp v. Blair, *supra.*

73—The Logansport, etc., Turnpike Co. v. Heil, 118 Ind. 135, 136, 20 N. E. Rep. 703. See also, State v. Lenihan, 88 Ia. 670, 56 N. W. Rep. 292.

admissible,[74] unless she is impeached on cross-examination.[75] In a few jurisdictions she may state the details of the complaint, even where she is not impeached.[76] The fact that she made complaint promptly is a circumstance which tends to corroborate her;[77] while, on the other hand, any considerable delay on her part, or an entire failure, to do so, may have the opposite effect. As said by Chief Justice Church, "Any considerable delay on the part of the prosecutrix to make complaint of the outrage constituting the crime of rape, is a circumstance of more or less weight, depending upon the other surrounding circumstances. There may be many reasons why a failure to make immediate or instant outcry should not discredit the witness. A want of suitable opportunity, or fear, may sometimes excuse or justify a delay. There can be no iron rule on the subject. The law expects and requires that it should be prompt, but there is and can be no particular time specified. The rule is founded upon the laws of human nature, which induce a female thus outraged to complain at the first opportunity. Such is the natural impulse of an honest female. But if instead of doing this she conceal the injury for any considerable time, it naturally excites suspicion of fraud, and tends to discredit her. The rule does not require that it is to be made to the first person who happens to be seen. A proper opportunity must be presented."[78] In some states, by statute, corroboration of the prosecutrix is essential to a conviction;[79] and in a few jurisdictions it is held essential at common law.[80] In most jurisdictions, however, it is not essential unless made so by statute.[81]

§ 52. **Same. Corroboration of complainant in a divorce case.** —Where a wife asks for a divorce on the grounds of cruelty

74—State v. Richards, 33 Ia. 420; Regina v. Megson, 9 Car. & P. 420.

75—Thompson v. State, 38 Ind. 39.

76—State v. Kinney, 44 Conn. 153; Burt v. State, 23 Ohio St. 394.

77—Laughlin v. State, 18 Ohio 99.

78—Higgins v. People, 58 N. Y. 377, 379.

79—State v. Carnagy, 106 Ia. 483, 76 N. W. Rep. 805.

80—Mathews v. State, 19 Neb. 330, 27 N. W. Rep. 234.

81—Johnson v. People, 197 Ill. 48, 64 N. E. Rep. 286 (assault with intent to rape); State v. Marcks, 140 Mo. 656, 41 S. W. Rep. 973, 43 S. W. Rep. 1095; Lanphere v. State, 114 Wis. 193, 89 N. W. Rep. 128.

and desertion, and the defendant introduces evidence of specific acts of the complainant, tending to reflect upon her character for sobriety, and modest and peaceable behavior, she may not rebut such evidence by proof of her general good character. Starkie says, "There are three classes of cases in which the moral character and conduct of a person in society may be used in proof before a jury, each resting upon peculiar and distinct grounds. Such evidence is admissible: first to afford a presumption that a particular party ~~has or~~ has not been guilty of a criminal act; secondly, to affect the damages in particular cases where their amount depends upon the character and conduct of any individual; and thirdly, to impeach or confirm the veracity of a witness."[82] And Justice Craig says, "While it is true, the defendant introduced, on the trial, evidence of specific acts of the complainant tending to reflect upon her character for sobriety, and modest, peaceable behavior, yet, under the rule announced by Starkie, we do not understand that she had the right to rebut by proof of general good character. Her general character was not in issue."[83]

§ 53. **Same. Corroboration of an accomplice. Definition.**—An accomplice is one who is in some way concerned in the commission of a crime. He may be a principal in the first or second degree, or an accessory before or after the fact. At the English common law a conviction might be based solely on the evidence of an accomplice.[84] In a case tried before Justice Buller, the twelve judges who reviewed it were unanimously of opinion that an accomplice alone is a competent witness, and that if the jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal.[85] Lord Ellenborough says, "That judges in their discretion will advise a jury not to believe an accomplice unless he is confirmed, or only in so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts he deposes to."[86] In some jurisdictions, statutory provisions prohibit basing a conviction solely

82—Starkie on Evid., Vol. 2, p. 364.

83—Berdell v. Berdell, 80 Ill. 604, 607.

84—Regina v. Hastings, 7 Car. & Payne, 87.

85—Atwood's case, 1 Leach, 464.

86—Jones' case, 2 Campbell, 132.

on the evidence of an accomplice.[87] In many jurisdictions, irrespective of statutory provisions, the courts exercise a discretion in the matter and frequently advise the jury to acquit where the evidence is confined to that of an accomplice.[88] Chief Justice Breese says, "It is a matter of discretion with the court to advise, rather than a rule of law. If a jury believe the testimony of an accomplice, who may have been induced to make disclosures, from remorse, or from any other motive, why should they not be allowed to credit him? Is he in a position different from any other witness whose credibility is to be inquired into by the jury? We can see no real difference."[89] Justice Craig says, "The record discloses evidence tending to implicate the witness, Flagg, in the crime, and to impeach his testimony. Under such circumstances, the jury ought to have received his evidence with great caution, but, in law, he was a competent witness, and the jury were the judges of the credibility to be attached to his evidence. If the evidence of the witness was worthy of belief, and the jury gave credit to his statements, then there can be no doubt in regard to the guilt of the defendant."[90] Chief Justice Craig says, "Freeman was an accomplice, it is true, but that fact did not exclude him from testifying in the case,—it would only go to his credibility. It was for the jury to determine whether the witness was worthy of belief. It is true, a jury should receive the evidence of an accomplice with caution, but if they think him worthy of belief, in view of all the circumstances, they may convict upon his evidence, although it might not be corroborated."[91] Justice Mulkey says, "Whatever the law may be in other States with respect to the right of a jury to convict upon the uncorroborated testimony of an accomplice, it is well settled the right exists here, and convictions upon such testimony will not be disturbed by this court on that ground alone."[92] Justice Scholfield says,

87—People v. Mayhew, 150 N. Y. 346, 44 N. E. Rep. 971; People v. Cloonan, 50 Cal. 449; Craft v. Com. 80 Ky. 349.

88—Ingalls v. State, 48 Wis. 647; State v. Maney, 54 Conn. 178, 6 Atl. Rep. 401; Com. v. Brooks, 9 Gray (Mass.) 299.

89—Cross v. The People, 47 Ill. 152, 160.

90—Earll v. The People, 73 Ill. 329, 335, 336.

91—Friedberg v. The People, 102 Ill. 160, 164.

92—Rider v. The People, 110 Ill. 11, 15.

"The principal evidence tending to prove the guilt of plaintiff in error is found in the testimony of his co-defendants,—accomplices who admit that they committed the arson, but say that plaintiff in error hired them to do it. It has often been questioned in England and in this country, by courts of the highest respectability, whether convictions on such testimony alone should be allowed to stand; but it is held by this court, in conformity with the prevailing ruling elsewhere, that convictions may be sustained on such testimony, alone, although the court may, in its discretion, in such cases, advise the jury not to convict. But the authorities agree, and common sense teaches, that such evidence is liable to grave suspicion, and should be acted upon with the utmost caution, for otherwise the life or liberty of the best citizen might be taken away on the accusation of the real criminal, made either to shield himself from punishment or to gratify his malice."[93] Phillipps says, "Accomplices, upon their own confession, stand contaminated with guilt. They admit a participation in the very crime which they endeavor, by their evidence, to fix upon the prisoner. They are sometimes entitled to even a reward upon obtaining a conviction, and always expect to earn a pardon. Accomplices are therefore of a tainted character, giving their testimony under the strongest motives to deceive."[94] Best says, "No doubt, if it was not absolutely necessary for the execution of the law against notorious offenders that accomplices should be received as witnesses, the practice is liable to many objections; and though under this practice they are clearly competent witnesses, their single testimony, alone, is seldom of sufficient weight with the jury to convict the offenders, it being so strong a temptation to a man to commit perjury, if, by accusing another, he can escape himself."[95] To like effect are Greenleaf [96] and Wharton.[97] It is to be observed, therefore, that while a jury may convict upon the uncorroborated testimony of an accomplice, such testimony is to be subjected to the same tests which are applied to the testimony of other witnesses, and courts should proceed upon such testimony with great caution. Moreover, the cir-

93—Hoyt v. The People, 140 Ill. 588, 595.

94—1 Phillipps on Evid. (Cowen, Hill & Edward notes) p. 111.

95—Best on Evid., § 170.

96—1 Greenleaf on Evid., § 379.

97—Wharton on Crim. Law (7th ed.) 785.

cumstances connected with such a case may be such as will justify a court of review in setting aside a conviction based upon such evidence.[98]

§ 54. **Some practical suggestions on the examination of witnesses.**—The examination of witnesses is both a science and an art. As an art it is capable of a very high degree of development. For a person to acquire such a degree of development, however, it is essential that he possess a peculiar talent for it. He must also be thoroughly grounded in the rules of evidence and their exceptions, and have practical experience in their application.

§ 55. **Same. The examination-in-chief.**—The object of the examination-in-chief is to elicit from the witness the truth and nothing but the truth in so far as it is beneficial to his client. Facts calculated to benefit the adversary should be carefully avoided. It is of the highest importance, therefore, to ask only such questions as will accomplish this object. Never ask any question without this definite object in view; and the moment you have elicited from the witness all that he knows beneficial to your client, *stop*. To be able to carry out this fundamental rule, it is essential that you possess *beforehand* information as to the extent of his knowledge of the facts of the case. To acquire this information you should question him carefully, in your office or elsewhere, before the trial. A memorandum should be made showing the extent of his knowledge as to all the material facts of the case; and this memorandum should be consulted at the trial, especially to avoid the serious mistake of omitting to interrogate him upon some material fact beneficial to your client, and which you may not be able to prove by any other witness. Don't forget that after you have turned him over to the adversary for cross-examination it is too late to rectify such an error.

The general mode of examining a witness, upon his examination-in-chief, should depend, in a large measure at least, upon his disposition. In this respect, witnesses may be divided into the following three classes: (1) The ordinary witness; (2) The hostile witness; and (3) The rapid witness.

98—Campbell v. The People, 159 Ill. 8 (1895).

§ 56. **Same. The ordinary witness.**—The ordinary witness, upon his examination-in-chief, should be made to feel at ease at once, and then allowed to tell his story in his own way with as little interruption as possible. Care should be taken to treat him in a very pleasant and friendly way. To put him at ease, a few unimportant questions should be asked, very deliberately and in a conversational tone. If, after he has begun to tell his story, interruptions become necessary, they should be made very pleasantly and in a somewhat apologetic manner. Having instructed him beforehand to relate the facts in the order of their occurrence, should he manifest a tendency to reverse this order gently direct him, without asking leading questions, along the proper course; and should he omit material facts, gently and pleasantly call his attention to them. If he should manifest considerable stupidity, exercise the greatest patience with him, and under no circumstances manifest the slightest irritability. Let your questions be short, clear and simple. Always avoid verbosity and also pomposity. When the witness has told all the facts which you desired to prove by him, don't ask him to repeat his testimony, but turn him over at once to your adversary for cross-examination.

§ 57. **Same. The hostile witness.**—The rules applicable to the mode of examination of a hostile witness are very different from those which are applicable to the mode of examination of an ordinary witness. In the first place, a hostile witness should not be called at all unless his testimony is indispensable. Where it is necessary to call him, his hostility should be made to appear at the earliest moment. Two reasons exist for this rule. One is that as soon as his hostility is made manifest the court will allow leading questions. The other is that the jury from that moment will give more weight to his favorable answers and less weight to his unfavorable answers. The questions submitted to him should be short and pointed. The reason is he should be given as narrow a scope as possible for explanations and evasions. Should he attempt to make explanations he should be stopped by informing him that they may be omitted for the present. As soon as he has given the information desired, turn him over at once for cross-examination. A hostile witness should be dismissed at the earliest moment practicable. Two reasons exist for this rule. One is that he should be given

as little opportunity as possible to give adverse testimony; and the other is that, since under the American rule the scope of the cross-examination is restricted to that of the examination-in-chief, the scope of the former should be made as narrow as possible consistent with the object desired.

§ 58. Same. The rapid witness.—In most respects, the principal rules applicable to a hostile witness are also applicable to a rapid witness. Both are dangerous witnesses and should be handled with much care. In the case of the rapid witness the danger lies in his telling too much. He may be likened to a street-car going down an incline. It is essential at all times to have control of the brake. He must be held in check constantly. To accomplish this, questions put to him should be short and pointed as in the case of the hostile witness. Moreover, the manner assumed toward him by counsel should be grave, dignified and ceremonious. Questions and demeanor of this character will tend strongly to repress him. As in the case of the hostile witness, the moment the desired information has been obtained from him he should be dismissed.

§ 59. Same. Duties of opposing counsel during the examination-in-chief.—Opposing counsel, during the examination-in-chief, have two principal duties to perform. One is to watch carefully the questions asked and the answers given with the view of having improper ones excluded; and the other is to take notes of the testimony given.

Frivolous objections should be carefully avoided. As a rule they are worse than useless, and if frequently indulged in they militate strongly against the party who makes them. With respect to merely formal or introductory matters leading questions are allowable, and objection to them should never be made. Even as to leading questions which are improper, it is not, as a general rule, considered good policy to object, in the first instance, abruptly to them. Counsel should first be good-naturedly cautioned that his questions are leading; and if he persist in asking them the court then should be appealed to for a ruling. It is well to observe that improper questions must be objected to before they are answered. Hence alertness on the part of the objector is an important consideration.

Notes of the testimony given on the direct examination should be taken, as they serve a useful purpose on the cross-examina-

tion, as well as in making the argument before the jury, and again in preparing a bill of exceptions in case of an appeal.

§ 60. **Same. The cross-examination.**—As previously stated, the legal engine of cross-examination is not only a *powerful* weapon, but it is also a *dangerous* one. Especially is the latter part of this statement true as regards inexperienced and unskillful advocates.

In the discussion pertaining to the mode of conducting the examination-in-chief, the most important rule given is, never ask any question without a definite object in view. In its application to the mode of conducting the cross-examination this fundamental rule is doubly important. The reason is, in view of the fact that the witness is presumably adverse to the cross-examiner he is all the more likely to give adverse answers. Lord Abinger used to say, "Never drive out two tacks by trying to hammer in a nail." This axiom has long been justly celebrated.

The cross-examiner should begin early to "size up" the witness with the view of forming an opinion as to his character and probable motives. As said by Sergeant Ballantine, "In order to attain success in this branch of advocacy, it is necessary for counsel to form in his own mind an opinion upon the facts of the case, and the character and probable motives of a witness, before asking a question. This doubtless requires experience, and the success of his cross-examination must depend upon the accuracy of the judgment he forms. The object of cross-examination is not to produce startling effects, but to elicit facts which will support the theory intended to be put forward."[1]

The character of the questions, and the manner which should be assumed toward the witness, should depend very largely upon the opinion formed as to his disposition and intentions. If the opinion be formed that he is an honest witness, and has no intention to misrepresent the facts, the manner assumed toward him should be pleasant and courteous. It is the common experience of mankind that most people are much more easily led than driven.

If, on the other hand, the conclusion be reached that the witness is dishonest, an opinion should be formed as to the extent to which he will be willing to go in manifesting it upon the stand.

1—"Some Experiences of a Barrister's Life," *supra.*

If the concluson be reached that he will not go so far as to flatly perjure himself, but will merely equivocate, he should be closely pressed as to the salient points of the case; but, if the conclusion be reached that he is a desperate character, and will not hesitate to commit perjury, and intends to swear his case through at all hazards, even to the extent of flatly perjuring himself, a different course should be pursued. In such a case he will probably be prepared along the line of the salient points, and the more he is questioned concerning them the more nearly consistent and truthful his story will appear. His attention, therefore, should be directed toward matters concerning which he is not likely to be prepared. This may be done by interrogating him in regard to minute details having no apparent immediate bearing upon the salient points. The questions should be put to him in rapid succession to prevent him from inventing answers on the spur of the moment which will be less likely to betray him.

Reynolds says, "In forming an opinion as to the moral character of a witness' testimony, it will be well to bear in mind the statement of Sergeant Ballantine, who says that his experience has led him to the conclusion that honest witnesses endeavor to keep themselves to the facts they come to prove, but that lying ones endeavor to distract the attention by introducing something irrelevant. Often the best method to deal with an adverse witness is to decline cross-examining him at all, which, if done with a rather supercilious air, will frequently impress the jury with the idea that his testimony is either totally untrustworthy, or else has little or no bearing upon the case."[2]

In cross-examining a witness, great care should be taken to avoid giving him an opportunity, (1) To supply any omission in the evidence given upon his examination-in-chief; or, (2) To explain any inconsistencies in that evidence; or, (3) To repeat any strong points in it which favor the party who called him; or, (4) To widen its scope so as to enable the party who called him to bring out on the re-examination testimony unfavorable to the other party to the suit which otherwise would have been inadmissible.

The omissions in the evidence given in the examination-in-

2—Reynolds on Evid. (3rd ed.), § 126.

chief, and the inconsistencies in that evidence may be discussed to advantage in the argument to the jury.

Great care should always be taken by counsel to avoid any display of anger on his part. It may be advisable sometimes to stir up the anger of the *witness,* but no consideration will ever justify a display of anger on the part of *counsel.* Nor is it good policy to attack a witness without just provocation, which is palpable to the jury. Nor to dispute with him. If he have a strong prejudice toward the adversary of the party who called him, make it palpable to the jury at the earliest moment possible.

§ 61. **Same. Women as witnesses.**—It is sometimes said that while women are often peculiarly good witnesses on the examination-in-chief, owing, in a large measure, to the minuteness, definiteness and circumstantial quality of their recollection, on the other hand they are usually peculiarly bad witnesses on the cross-examination. In advising a young lawyer upon the subject, the distinguished advocate, Rufus Choate, once humorously remarked: "Let me give you my dying advice,—never cross-examine a woman. It is no use. They cannot disintegrate the story they have once told, they cannot eliminate the part that is for you from that which is against you. They can neither combine, nor shade, nor qualify. They go for the whole thing; and the moment you begin to cross-examine one of them, instead of being bitten by a single rattlesnake, you are bitten by a whole barrel full. I never, except in a case absolutely desperate, dare to cross-examine a woman."[3]

§ 62. **Same. Duties of opposing counsel during the cross-examination.**—The chief duty of opposing counsel during the cross-examination is to watch the answers given and take notes of them where necessary for use in the re-examination. It is also his duty, *in some instances,* to object to questions asked. It must be remembered, however, that frivolous interruptions are very objectionable, and usually militate against the party who makes them. Such interruptions always deserve, and frequently get, a rebuke from the court, which always leaves an unfavorable impression upon the minds of the jury. Instances, however, *sometimes* arise where objections are not only justifiable

3—Memoir of Rufus Choate, by Clement Hugh Hill. Proceedings of the Mass. Hist. Soc. 154 (Oct. 1896).

but should be made. Thus, where questions are asked the witness concerning matters not at all connected with the matter brought out in his examination-in-chief, or which concern statements in writing made previously by him and the writing is not produced, and the like, objections are proper and should be made.

§ 63. **Same. The re-examination.**—The scope of the re-examination is limited to that of the cross-examination; and its purpose is to afford an opportunity to the witness to explain any of his statements made upon that examination. One of its advantages is, it sometimes affords an opportunity to bring out matters which cannot be brought out on the examination in-chief. Thus, on the cross-examination the witness may be asked concerning statements made by him in a certain conversation; and this will entitle counsel to bring out on the re-examination the whole of the conversation in explanation of such statements. Counsel, however, must form an opinion beforehand as to the advantage or disadvantage to his client of such explanation; and should he be in doubt in regard to this point, it is usually advisable to let the matter rest, as the explanation may result in making matters worse.

ILLUSTRATIONS

ILLUSTRATIONS ON JUDICIAL NOTICE.

1. The fact in issue is, whether a certain patented machine, the novelty of which is denied, involves any new principle; and the question is, whether the court will take judicial notice of the principle long applied in the common ice cream freezer.

The court will take judicial notice of this principle owing to its universal notoriety.[1]

2. The fact in issue is, at what time, on a certain night, the moon rose; and the question is, whether the court will take judicial notice of this fact.

The court will take judicial notice of this ultimate fact, and also that Gruber's Almanac, a book of universal notoriety, is admissible in evidence as a proper medium of proof of such ultimate fact.[2]

3. The fact in issue is, whether Central America is a sovereign and independent state, recognized and treated as such by the King of England; and the question is, whether the court will take judicial notice that it is not.

The court will take judicial notice that it is not, although the declaration alleges the contrary, and the defendant has demurred to the declaration.[3]

4. The facts in issue are, whether an unoccupied building is more exposed to danger from fire than an occupied one, and whether an ordinarily prudent man, having under his control a large manufacturing establishment, will keep the premises insured against loss by fire, to an amount approximating its value; and the question is, whether the court will take judicial notice that the answer to each question is in the affirmative.

The court will take judicial notice that the answer to each question is in the affirmative.[4]

5. The question is, whether the courts of Illinois will take

1—Brown v. Piper, 91 U. S., 37.
2—Moonshower v. State, 55 Md., 11.
3—Taylor v. Barclay, 2 Sim., 213; State v. Jarrett, 17 Md., 309.
4—White v. Phoenix Ins. Co., 83 Me., 279; Hill v. Am. Surety Co., 107 Wis., 19, 81 N. W. R., 1024.

judicial notice that the city of Chicago is within Cook county, and that Cook county is within the State of Illinois.

The courts of Illinois will take judicial notice of both these facts.[5]

6. The question is, whether the Circuit Court of the United States, for the district of Maryland, will take judicial notice that a public law of Louisiana requires that the original contract of sale, of certain slaves, shall be kept in the possession of the notary who records the sale.

The Circuit Court of the United States will take judicial notice of the public laws of Louisiana, and thereby render it unnecessary for the party, who seeks to prove the contract of sale, and who offers in evidence a copy of the contract, to account for the nonproduction of the original.[6]

7. The question is, whether the Supreme Court of the United States, in a suit brought up by writ of error to the Maryland Court of Appeals, will take judicial notice of the public laws of Pennsylvania.

The Supreme Court of the United States will not take judicial notice of the public laws of Pennsylvania. If, however, the suit had been brought up from a federal court, or, from the highest court of Pennsylvania, it would.[7]

8. The question is, whether a court of the state of Illinois will take judicial notice of the public laws of the State of Michigan.

As the two states, in this respect, are foreign to each other, a state court of the one will not take judicial notice of the public laws of the other.[8]

9. The question is, whether the court will take judicial notice that the letters "B. & O.," on a railroad engine, mean Baltimore & Ohio Railroad Co.

The court, in determining the ownership of the engine, will take judicial notice that the letters "B. & O." mean Baltimore

5—Sullivan v. People, 122 Ill., 385; Saukville v. State, 69 Wis., 178.

6—Owings *et al.* v. Hull, 9 Pet., 607.

7—Hanley v. Donoghue, 116 U. S., 1.

8—Horton v. Critchford, 18 Ill., 133.

& Ohio Railroad Co., although the engine is upon the tracks of another railway company.[9]

10. The question is, whether the courts of one country will take judicial notice of a state of war between that country and a foreign one.

Courts will take judicial notice of the existence of a war between their country and a foreign one, and also of the facts of public history relating to its origin, progress and conclusion; but they will not, as a rule, take judicial notice of a war between foreign countries.[10]

11. The question is, whether jurors will take judicial notice that gin is intoxicating liquor.

Jurors will take judicial notice that gin is intoxicating liquor, and proof that a person sold gin is proof that he sold intoxicating liquor.[11]

12. The question is, whether the court will take judicial notice of the difference of time in different longitudes.

The court will take judicial notice of this fact.[12]

13. The question is, whether the court will take judicial notice of the distance between two well-known cities of the United States, the ordinary speed of railway trains running between them, and the ordinary time of travel, by train, from one to the other.

Some courts hold that such facts will not be judicially noticed;[13] but the better view is to the contrary.[14]

14. The question is, whether an Admiralty Court of the United States will take judicial notice that certain text-books and statute books, of admitted authority, are a proper medium by which the law of England may be proved.

The Admiralty Court will take judicial notice that such books are a proper medium of proof.[15]

9—Ryan v. B. & O. R. R. Co., 60 Ill. App., 615.

10—Dolder v. Huntingfield, 11 Ves. Jr., 292.

11—Com. v. Peckham, 2 Gray, 514.

12—Curtis v. March, 4 Jur., N. S., 112.

13—Wiggins v. Burkham, 10 Wall. (U. S.), 129.

14—Pierce v. Langfit, 101 Pa. St., 507.

15—The Pawashick, 2 Lowell, 142.

15. The question is, whether a state court will take judicial notice of the general elections held within the state, the officers to be elected thereat, and the dates of holding them.

The court will take judicial notice of all of these facts.[16]

16. The question is, whether, in an action against a city street railway company, for damages to property, the court will take judicial notice that extreme popular ill will existed against the company, and, but a few weeks before the trial, had culminated in mob violence.

The court will take judicial notice of both these facts.[17]

17. The question is, whether the courts of the United States will take judicial notice of the ports and waters of the United States in which the tide ebbs and flows; also, of the location of a foreign port, the existence of impediments at its entrance, and whether vessels of a certain draft can enter it.

The courts of the United States will take judicial notice of all these facts.[18]

18. The question is, whether the court will take judicial notice of the manner in which ordinary railroad business is conducted, and of the ordinary, practical operation of the road.

The court will take judicial notice of these facts.[19]

19. The question is, whether the Supreme Court of Illinois will take judicial notice that, in Illinois, many unincorporated religious societies have existed.

On the ground of common notoriety, the Supreme Court of Illinois will take judicial notice of this fact.[20]

20. The question is, whether an English court, in an action against the acceptor of a bill of exchange, where the declaration alleges that the bill was drawn at Dublin, will take judicial notice that the Dublin alleged is Dublin, Ireland.

The court will not take judicial notice that a bill drawn at Dublin was drawn at Dublin, Ireland; because, to do so, would,

16—Andrews v. Knox Co., 70 Ill., 65.

17—Geist v. Detroit City Ry. Co., 91 Mich., 446.

18—City Council of Montgomery v. M. & W. Plank-Road Co., 31 Ala., 79.

19—C. C. C. & St. L. Ry. Co. v. Jenkins, 174 Ill., 398.

20—Alden v. St. Peters Parish, 158 Ill., 631.

in effect, be taking judicial notice that there is but one Dublin in the world.[21]

21. The question is, whether the court will take judicial notice that carrying on the barber business on Sunday is not a work of necessity.

The court will take judicial notice of the fact that carrying on the barber business on Sunday is not a work of necessity.[22]

22. The question is, whether the court will take judicial notice of the meaning of the abbreviations,—"C. O. D.," "A. M." and "P. M."

The court will take judicial notice of the meaning of these ordinary abbreviations.[23]

23. The question is, whether the court, in an action in ejectment, in which a deed by the Governor of the state is offered in evidence, will take judicial notice that the seal of the state is what it purports to be.

The court will take judicial notice that the seal of the state is what it purports to be. It is universally recognized that the courts of a state take judicial notice of its seal, and also of the signatures of heads of departments.[24]

24. The question is, whether a state court will take judicial notice of the boundary of the state, and of the division of the state into counties.

The court will take judicial notice of the boundary of the state,[25] and also of the division of the state into counties;[26] but it will not take judicial notice of the *precise* boundaries of local divisions, except in so far as such boundaries are disclosed in the public statutes.[27]

25. The question is, whether the United States courts will take judicial notice of the boundary lines between the several states of the Union.

21—Kearney v. King, 2 B. & Ald., 301; Woodward v. Ry. Co., 21 Wis., 309.

22—State v. Frederick, 45 Ark., 347.

23—Paris v. Lewis, 85 Ill., 597; Hedderich v. State, 101 Ind., 564.

24—Com. v. Dunlop, 89 Va., 431.

25—State v. Pennington, 124 Mo., 388.

26—Dickenson v. Breeden, 30 Ill., 279.

27—Boston v. State, 32 Am. Rep., 575.

The United States courts will take judicial notice of the boundary lines of the several states of the Union.[28]

26. The question is, whether the court will take judicial notice that natural gas is, "in a high degree, inflammable and explosive"; that gin and turpentine are inflammable liquids, within the meaning of that term as used in an insurance policy prohibiting the keeping of inflammable liquids for sale on the premises; that kerosene is inflammable, and that alcohol is an explosive, within the meaning of those terms as used in insurance policies.

The court will take judicial notice that natural gas is "in a high degree inflammable and explosive";[29] but it will not, in the cases stated, take judicial notice that kerosene is inflammable,[30] nor that alcohol is explosive.[31] Some courts, however, will take judicial notice that kerosene is inflammable.[32]

27. The question is, whether the court will take judicial notice of the number of newspapers published in the county, or whether any newspaper is published therein.

The court will not take judicial notice of either of these facts.[33]

28. The question is, whether the court will take judicial notice of the custom of merchants as regards protests and notice of non-payment of negotiable paper.

The court will take judicial notice of this custom.[34]

29. The question is, whether the courts of Kansas will take judicial notice of the common law of Illinois.

The courts of Kansas will not take judicial notice of the common law of Illinois.[35]

30. The question is, whether the court, where a libel charged that the friends of the plaintiff had "realized the fable of the frozen snake," will take judicial notice that knowledge of that fable exists generally in society.

28—Coffee v. Groover, 123 U. S., 11.

29—Jamieson v. Ind. etc. Co., 128 Ind., 558.

30—Wood v. N. W. Ins. Co., 46 N. Y., 421.

31—Willis v. Germania Ins. Co., 79 N. C., 285.

32—State v. Hayes, 78 Mo., 307.

33—Atkinson v. Lay, 115 Mo., 538.

34—Fleming v. McClure, 2 Am. Dec., 671.

35—St. Louis Ry. Co. v. Weaver, 35 Kan., 412.

The court will take judicial notice that knowledge of the fable does exist generally in society.[36]

31. The question is, whether the court will take judicial notice of the contents of the bible; also of the fact that the religious world is divided into sects, and of the general doctrine of each sect.

The court will take judicial notice of all of these facts.[37]

32. The question is, whether the court will take judicial notice that the average height of men is less than six feet; and, that a person, the top of whose head is four feet and seven inches above a seat upon which he is sitting, must have a frame at least nine feet high.

The court will take judicial notice of both of these facts.[38]

33. The question is, whether the court will take judicial notice of the meaning of the following abbreviations: "St. Louis, Mo."; "New Orleans, La."; "C., B. & Q. R. R. Co."

As a general rule, courts will take judicial notice of these common abbreviations. Some courts, however, without any apparent reason, have declined to do so.[39]

34. The question is, whether the court, in an action on an alleged promissory note, executed in New York City, and made payable at Kankakee, Ill., for a definite amount, "with current rate of exchange on New York," will take judicial notice of the current rate of exchange between those two cities.

The current rate of exchange, between commercial points, is as subject to fluctuation as the value of labor, or the price of grain, cattle, or other articles of property, and courts will not judicially notice it. Moreover, as the clause within the quotation marks renders the amount to be paid uncertain, the instrument is not a promissory note, and therefore a consideration for the promise will not be presumed, but must be alleged and proved.[40]

36—Hoare v. Silverlock, 12 Adol. & Ell., N. S., 624.

37—Weiss v. Edgerton School Board, 41 Albany L. J., 452.

38—Hunter v. N. Y., O. & W. Ry. Co., 116 N. Y., 615.

39—Ellis v. Park, 8 Tex., 205; Accola v. Chic., B. & Q. Ry. Co., 70 Ia., 185.

40—Lowe v. Bliss *et al.*, 24 Ill., 168.

ILLUSTRATIONS ON PRESUMPTIONS.

1. The question is, whether baggage, which has had passage over six connecting lines of railroads, and which was in perfect condition when given in charge of the employees of the first road, but which is found damaged when it reaches its destination, is presumed to have received the damage while in charge of the employees of the last road.

By the weight of authority, and, on the ground perhaps of public policy or necessity, there is a presumption that the damage to the baggage was received while in charge of the employees of the last road.[1]

2. The question is, whether an error, or misconception, on the part of the vendee, which results in his written order for the purchase of certain goods being much larger than he intended, will, in the absence of fraud, or mutual mistake, justify a reformation of the order, or constitute a defence in an action for the purchase price.

In the absence of fraud, or mutual mistake, the vendee is conclusively presumed to know the contents, and the legal effect, of his written order. It follows, therefore, that the order as given is binding upon the vendee.[2]

3. A bequeathed a legacy to B, who disappeared from his home in 1853, and was last heard of in June, 1860. A died in 1861. C, who was B's next of kin, brought suit in 1869 to recover A's legacy to B. The burden of proof was upon C to establish the fact that A survived B. The question is, whether any presumption existed sufficient to make a prima facie case on this point.

There is no presumption of law that B continued to live until after A's death. At most, there is only a presumption of fact; and such a presumption is not sufficient to establish a prima facie case.[3]

4. A claims curtesy in the lands of his deceased wife. The

1—Moore v. N. Y., etc. Ry. Co., 173 Mass., 335.

2—Coates & Sons v. Buck, 93 Wis., 128; Straker v. Ins. Co., 101 Wis., 413.

3—In re Phene's Trusts, L. R., 5 Ch., 139.

statute allows him curtesy, provided his wife left no issue by any former husband. His wife was divorced from a former husband, B, in Nov., 1884, and was married to A, in Feb., 1885. In July, 1885, a child was born. This child contests A's claim. The question is, whether the child is conclusively presumed to be A's child.[4]

At the old common law, if the husband was within the four seas, and not impotent, when the child was begotten, the child was conclusively presumed legitimate. The modern rule is less rigorous. It excludes evidence, by the husband or wife, of non-access; but it allows evidence of extrinsic facts to rebut the presumption. In this case, the facts conclusively rebut the presumption that the child is A's, and conclusively establish that its father is B.[5]

5. In 1876, A married B, in Sweden. In 1884, he came to the United States, leaving B at home. In 1887, he heard of B for the last time. She was then living, and in good health. In 1889, A married C; and, soon afterward, he was prosecuted for bigamy. The question is, whether any presumption exists that B was still living when A married C.

The burden of proof is upon the state to establish A's guilt beyond a reasonable doubt. He is presumed to be innocent. An essential element of his guilt is the fact that B was living when A married C. There is no presumption of law that such was the case. Hence, there is no prima facie case of this fact.

4—In Hargrave v. Hargrave, 9 Beav., 552, Lord Langdale, M. R., states the modern rule very clearly, in these words: "A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by proper and sufficient evidence, showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse.

Stephen says, in a note to article 98, in his Digest of Evidence, "I am not aware of any decision as to the paternity of a child born say six months after the death of one husband, and three months after the mother's marriage to another."

5—Shuman v. Shuman, 83 Wis., 250.

The jury, however, may find, as a presumption of fact, that this element of guilt did exist.[6]

6. In the appalling and disastrous Johnstown flood, A, his wife, and two children were swept away and perished. There was no direct evidence as to the order in which they died. The question is, whether there is any presumption of survivorship in such a case.

At common law, no presumption at all exists in this case. Title to property descends as if all died at the same time; but this is not owing to the fact of any presumption that all died at the same time, but because the party who alleges the contrary must prove it by affirmative evidence, to succeed, and he is unable to do so.

According to the civil law, a person between the ages of fifteen and sixty is presumed to survive one less than fifteen or more than sixty; and a male person is presumed to survive a female.[7]

7. In 1864, A married B. In 1868, he married C. In 1879, he married D. In 1880, he married E. In 1881, he was prosecuted for bigamy for marrying E while his wife D was still living and not divorced. The prosecution proved A's marriage to D, and his marriage to E while D was still living and not divorced. A's defence was that his marriage to D was void because his first wife B was living at that time and not divorced. To establish this, he proved by the court records that he had been convicted of bigamy for marrying C while B was living and not divorced; and, as there was no evidence to show that B was dead when he married D, he contended that B was presumed to be living at that time. The question is, whether any presumption exists that B was still living when A married D, sufficient to establish a prima facie case that A's marriage to D was void.

There is no presumption of law that B continued to live from the time of A's marriage to C to the time of his marriage to D. At most, there is only a presumption of fact, to be found, if at all, by the jury.[8]

6—State v. Plym, 43 Minn., 385.

7—Cowman v. Rogers, 73 Md., 403; Newell v. Nichols, 75 N. Y., 78.

8—Regina v. Willshire, 6 Q. B. D., 366.

8. A girl, between the ages of eleven and twelve years, is indicted for the unauthorized sale of intoxicating liquors. The question is, whether a presumption exists that she was *doli capax* when the sale was made.

At common law, there is no presumption that she was capable of committing any crime. The question is one for the jury to determine from the evidence in the case, and, in view of all the circumstances surrounding the transaction.[9]

9. A boy, between the ages of eleven and twelve years, is indicted for murder. The question is, whether a presumption of law exists that he was *doli incapax* when he killed the deceased.

At common law, there is a prima facie presumption that he was incapable of committing murder, or any other crime. In Illinois, sec. 283, of the Criminal Code, provides that an infant under ten years of age shall not be found guilty of any crime or misdemeanor.[10]

10. A and his wife are jointly indicted for arson, committed by both in the presence of each other. The question is, whether a presumption of law exists that the wife was coerced by her husband.

The law presumes that A coerced his wife; but, to entitle her to the benefit of this presumption, her coverture must be clearly proved, and the presumption must not be overturned by evidence to the contrary.[11]

11. A owed B $1,000 for services rendered. This debt was due. A bequeathed to B a legacy of $500 in money, and household goods worth about $500. This legacy was to be given to B one year after A's death. A's executor now claims that the legacy to B is not a gift, but a satisfaction of the debt. The question is, whether any presumption exists in favor of this claim.

There is no presumption of law that the legacy is not a gift. But, in equity, a presumption sometimes exists whereby a legacy operates to extinguish a debt. The requisites of such

9—Com. v. Mead, 92 Mass., 398.
10—Angelo v. The People, 96 Ill., 209.
11—Davis v. State, 15 Ohio, 72.

cases are as follows: (1) The legacy must be equal to, or greater than, the debt due; (2) The debt and the legacy must be of the same nature; (3) The debt must be certain and not contingent; (4) There must be no particular motive assigned in the will for the legacy; (5) The time of payment of the legacy must be the same as that of the debt. In the case given, several of these requisites are wanting. There is, therefore, no presumption at all that the legacy is a satisfaction of the debt.[12]

12. A, who kept a general store, gave B, an employee, in settlement of their accounts, a due bill for $2,100. Subsequently it appeared that B was indebted to A for a considerable sum, and, in pursuance of an arrangement between them, the due bill was surrendered to A. B now claims that it was surrendered to A merely for him to hold until the amount of B's debt to A should be determined, while A claims that it was surrendered in payment of that debt. The question is, whether any presumption exists in favor of A's claim sufficient to establish a prima facie case on that point.

Possession by the debtor of the evidence of a debt raises the presumption that the debt is paid. A presumption exists, in favor of A's claim, which puts the burden of proof upon B to overcome it by a preponderance of the evidence.[13]

13. In 1854, A, a woman of mature years, executed a deed to B. In 1861, it became material to determine whether A was married when she executed the deed. There was evidnce to show that she was a married woman in 1860. The question is, whether any presumption arises from her married condition in 1860 that she was married when she executed the deed in 1854.

There is no presumption of any kind that A was a married woman in 1854. The presumption of coverture is prospective from the time it is shown to exist, and never retrospective.[14]

14. A, for more than 20 years, has enjoyed, from a deep well on his own premises, water which percolated through underground, undefined channels in B's land. The question is,

12—Cloud v. Clinkinbeard's Executors, 8 B. Monroe, 397; 48 Am. Dec., 397.

13—Tedens *et al.* v. Schumers, 112 Ill., 263.

14—Erskine v. Davis, 25 Ill., 228.

whether any presumption exists of a grant of this right of enjoyment to A.

There is no presumption whatever of such a grant; nor would continued enjoyment for any length of time create one.[15]

15. A certain mill-dam has been in use continuously for more than 60 years. The question is, whether any presumption exists that all the upper proprietors, whose rights have been injuriously effected by it, granted a right to erect it.

There is a conclusive presumption of law that such a grant exists.[16]

16. A has a windmill on his farm near B's land. For more than 30 years he has enjoyed a free current of air over B's land, as of right, for propelling it. The question is, whether any presumption exists of a grant by B of this right of enjoyment.

As it would not be natural for B to interrupt the current of air, no presumption exists of a grant. At the old common law, a right to the use of light and air might be acquired by prescription; but this doctrine has not been followed in the United States.[17]

17. A posted a prepaid letter at Carterville, Ill., addressed to B, at St. Louis, Mo. The question is, whether a presumption of law exists that it reached its destination and was duly received by B.

No presumption of law exists to establish a prima facie case. There is, however, a presumption of fact, amounting to a probability. The assumption is that what ordinarily results from the transmission of a letter through the postoffice probably resulted in this case.[18]

18. A is tried for burglariously entering B's house and stealing his watch. The evidence proves that the burglary and the larceny were committed at the same time. The question is, whether a presumption of law is raised, as to A's guilt,

15—Chasemore v. Richards, 7 H. L. C., 349.

16—Leconfield v. Lonsdale, L. R., 5 C. P., 657.

17—Webb v. Bird, 13 C. B. (N. S.), 841.

18—Henderson v. Carbondale Coal & Coke Co., 140 U. S., 37.

based upon the fact that soon after the crimes were committed the watch was found in his possession.

There is no presumption of law raised, of A's guilt; but, a presumption of fact may be raised sufficient to warrant his conviction of either crime.[19]

19. In 1841, A married B, in Kentucky. In 1842, he deserted her and came to Illinois. In 1843, he formally married C and cohabited with her until his death in 1868. In 1846, B obtained a divorce from A on the ground of desertion. A never learned of this divorce. C had no knowledge of A's marriage to B until after his death. A and C were reputed to be husband and wife. The question is, whether any presumption exists that, from 1846 to 1868, A and C were husband and wife.[20]

As B was living, and not divorced, when A married C, the cohabitation of A and C was meretricious in its inception. In the absence of any evidence to the contrary, a presumption of fact exists that it continued meretricious. The removal of the

19—Magee v. The People, 139 Ill., 138.

20—The following propositions, upon this subject, are believed to be in accord with the weight of authority:

1. A cohabitation, illicit in its inception, is presumed to continue illicit, unless rebutted by evidence to the contrary.

2. When evidence is given to rebut the presumption of illicit cohabitation, the question of marriage is then a question of fact for the jury.

3. In the absence of any evidence to rebut the presumption of continued illicit cohabitation, the court is bound to decide against a marriage.

4. When, owing to some impediment to a valid marriage, an illicit cohabitation in its inception is proved, mere continued cohabitation, after the impediment has been removed, is insufficient to rebut the presumption of continued illicit cohabitation.

5. Proof of a desire to form a matrimonial union, manifested by the parties while competent to contract a valid marriage, and, of continued cohabitation thereafter, raises a presumption of fact, in rebuttal of the presumption of continued illicit cohabitation, which binds the court to submit the question of marriage to the jury.

6. When the circumstances are such as to render a mutual desire for marriage improbable, as, where a negro cohabits with a white person, or a man with a prostitute, or a countess with her footman, the presumption of marriage is correspondingly weakened.

See the valuable note, by Irving Browne, to Ins. & Trust Company's Appeal, 57 Am. Rep., 448.

impediment, which rendered the cohabitation meretricious, did not, of itself, change the nature of the cohabitation. A formal marriage, however, was not essential to do this. Consent of the parties to assume the marriage relation, and an actual assumption of such relation by them, would have been sufficient. A presumption of fact of marriage is raised, based upon the cohabitation; but this presumption is rebutted and overcome by proof that it was meretricious in its inception.[21]

20. A sues B on a policy of insurance to recover the amount of the policy. B defends on the ground that the assured committed suicide. The question is, whether any presumption exists that the assured's death resulted from natural causes.

In the absence of evidence upon this point, or, when the evidence is equally balanced, a presumption exists that the death resulted from natural causes. The question, however, should be fairly submitted to the jury and be decided by them upon a preponderance of the evidence. An instruction by the court to the jury that "in case of death, and the evidence leaves the matter in doubt whether the deceased came to his death by an act of self-destruction or by accident, the law presumes the death to have occurred from accident," is erroneous. It binds the jury to find that the death resulted from accident, if they have any doubt at all that the deceased committed suicide.[22]

21. In an action by A against B, involving the validity of a mortgage, there is evidence that the mortgage is fraudulent. The court instructs the jury that, if they "believe, from the evidence, that said chattel mortgage was duly executed and recorded according to law, and that the same purports a consideration, then the presumption of law is, that the same is *bona fide* and valid." The question is, whether this instruction is correct.

The instruction is objectionable, and may mislead the jury. It should explain to the jury that the presumption of law is disputable and not conclusive.[23]

22. A is indicted and tried for murder. The evidence shows

21—Cartwright v. McGown, 121 Ill., 388; In re Ins. & Tr. Co., 57 Am. Rep., 448.

22—Ins. Co. v. Hogan, 80 Ill., 35.

23—Garrettson v. Pegg, 64 Ill., 111.

that, immediately after the murder occurred, he fled. The question is, whether the presumption of guilt, arising from his flight, is a presumption of law, or a presumption of fact.

"The wicked flee, when no man pursueth, but the innocent are as bold as a lion," is a familiar maxim. At the old common law, a person who fled to avoid being tried for felony forfeited his goods, even when acquitted. The presumption of guilt, arising from flight, is sometimes incorrectly treated as a presumption of law. In no case, however, is it anything more than a presumption of fact. Its weight may be great or small, depending upon the circumstances of the particular case.[24]

23. A and B, two full-blooded Cherokee Indians, are indicted for the murder of C, a white man. The Cherokee Nation claims jurisdiction over the defendants on the ground that C had been adopted. The United States Circuit Court denies this claim. The Cherokee statutes provide that all white men legally married to Cherokee women, and residing within the Nation, are adopted citizens. C had obtained a license to marry D, a citizen of the Cherokee Nation. The question is, whether the fact that a marriage license has been issued raises a presumption of law, or a presumption of fact, that all satutory prerequisites thereto have been complied with.

The fact that a marriage license has been issued carries with it a presumption of law that all statutory prerequisites thereto have been complied with, and one who claims the contrary must affirmatively show that fact.[25]

24. A, the holder of a negotiable promissory note, sues C, a third party, whose name is indorsed in blank on the note, and seeks to hold him liable as a guarantor. The question is, whether a presumption of law exists that C's liability on the note is that of a guarantor.

In some states, including Illinois, the placing of the name of a third party on the back of a promissory note is prima facie evidence that the liability intended to be assumed is that of guarantor. Evidence is admissible, however, to rebut this disputable presumption of law, and show that the liability assumed is that of merely an indorser.[26]

24—Hickory v. United States, 160 U. S., 408.

25—Nofire v. United States, 164 U. S., 657.

26—De Witt County Nt. Bank v. Nixon *et al.*, 125 Ill., 615.

ILLUSTRATIONS ON BURDEN OF PROOF.

1. A gave B a deed of a piece of land, and took back a mortgage for support. C claims that B, upon the same day he got his deed, gave him a second mortgage on the said piece of land, and he now files a bill against A to redeem. A denies that B gave C a second mortgage on said lands. Issue joined on this point. The question is, upon whom is the burden of proof.

The burden of proof is upon C to prove his claim.[1]

2. A sues B for the value of certain services rendered by him to B. B claims that the services were to be gratuitous. The question is, upon whom is the burden of proof.

The burden of proof is upon A to establish not only the services, but also the fact that he was to receive pay for them.[2]

3. A brings an action against B for malicious prosecution. B defends on the ground that his action against A was based upon probable cause. The question is, upon whom is the burden of proof.

Want of probable cause is an essential element of A's case, and although this element is a negative one, the burden of proof is upon A to establish it.[3]

4. A sues B for the reasonable value of certain services which he rendered to B. B defends upon the ground that the services were rendered under a contract for a specified sum, and that the amount agreed upon has been paid to A. The question is, upon whom is the burden of proof.

A claims that he was to receive the reasonable value of his services. B, in effect, denies this. The burden of proof, upon all the evidence in the case, is upon A to prove his claim.[4]

5. A, C's executor, seeks to probate C's will. B, C's heir, contests it on the ground that C, at the time he executed the

1—Powers v. Russell, 13 Pick., 69.

2—Hingeston v. Kelly, 18 L. J. (Exch.), 360.

3—Abrath v. N. E. Ry. Co., 11 Q. B. D., 440; Ames v. Snider, 69 Ill., 376.

4—Phipps v. Mahon, 141 Mass., 471.

will, was mentally incompetent. The question is, upon whom is the burden of proof.

The burden of proof is upon A. To entitle B to win, after A has made a *prima facie* case, B must overcome or neutralize not only A's evidence but also the presumption in favor of C's sanity.[5]

6. In a contest between A and B, A claims under a will executed by C on Nov. 7th, and B claims under a will executed by C two days later. A alleges that C's signature to the will of Nov. 9th was obtained through B's fraud. The circumstances connected with the execution of this will arouse grave suspicions. The question is, upon whom is the burden of proof, as regards the alleged fraud connected with the will of Nov. 9th.

The burden of proof is upon B to remove the suspicious circumstances connected with the execution of that will, and to establish its validity.[6]

7. A is on trial for the murder of B. He admits killing B, but claims that his act was justifiable. The question is, upon whom is the burden of proof.

The burden of proof is upon the state to establish A's guilt beyond a reasonable doubt.[7]

8. A is on trial on the charge of murder. His defense is insanity. The question is, upon whom is the burden of proof.[8]

An essential element of A's guilt is his sanity, at the time he did the act. The burden of proof is upon the state to prove A's guilt beyond a reasonable doubt. To do this, it must prove, beyond a reasonable doubt, that A, at the time he did the act, was legally capable of entertaining criminal intent. The presumption of sanity is sufficient to meet this

5—Carpenter v. Calvert, 83 Ill., 62; Wilbur v. Wilbur, 129 Ill., 392; Egbers v. Egbers, 177 Ill., 82; Johnson v. Johnson, 187 Ill., 86.

6—Tyrrell v. Painton, (1894) Probate, 151.

7—People v. Downs, 123 N. Y., 558.

8—"Every person is presumed to be sane and to be responsible for his acts. The burden of proving that he is irresponsible is upon the accused person; but the jury may have regard to his appearance and behavior in court." Stephen Dig. Crim. Law, art. 28.

requirement, provided contradictory evidence is not given sufficient to cast a reasonable doubt upon the presumption.[9]

9. A hired B for a definite term, but discharged him, without cause, before the end of the term. B sued A for breach of the contract, and the court gave the jury the following instruction: "The court instructs the jury that before the plaintiff can recover in this case an amount of damages commensurate or equal to the wages agreed upon, the plaintiff must prove that he tried to obtain work during the period of hiring and failed to do so after making reasonable effort." The question is, whether this instruction is prejudicial error.

The burden of proving that other work was, or could have been, obtained by B, was upon A. The instruction given states the law to be exactly opposite of what it is, is calculated to mislead the jury, and is, therefore, prejudicial error.[10]

10. A sued B on a promissory note. B pleaded the general issue, payment, and a set-off. A made a *prima facie* case by putting the note in evidence. B gave some evidence tending to prove payment and a set-off. The court instructed the jury that "unless the plaintiff proves by a preponderance of the evidence that the defendant is indebted to the plaintiff on the note sued on, the jury should find for the defendant." The question is, whether this instruction was prejudicial error.

Payment and set-off are affirmative defenses, and the burden of proving them was upon the defendant. The instruction, therefore, was prejudicial error.[11]

11. A sues the receiver of a Ry. Co. for damages caused by the Co. negligently killing his dog. Defendant admits the killing, but insists that it was unavoidable. The statute provides that "In all actions against railroad companies for damage done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care upon the part of the servants of such company in

9—Davis v. United States, 160 U. S., 469; Hopps v. People, 31 Ill., 385; Dacey v. People, 116 Ill., 555.

10—Brown v. Board of Education, 29 Ill. App., 572.

11—Whitely v. Clark, 29 Ill. App., 36.

reference to such injury." The question is upon whom is the burden of proof.

The statute determines what shall constitute a *prima facie* case of negligence on the part of the Co., but it does not affect the question of burden of proof. The burden of proof is upon the plaintiff to establish his case. *Prima facie* presumptions take the place of evidence, but they do not change the burden of proof.[12]

12. A sues the T. Ins. Co. on a policy of insurance on a cargo of rice on board a ship. The Co. defends upon the ground that the ship was unseaworthy when she left port. The question is, upon whom is the burden of proof.

According to the English rule, the burden of proof is upon the defendant. Some American courts follow the English rule and some do not.[13]

13. A is indicted and tried for practicing medicine without a license. The question is, upon whom is the burden of proof, as regards his authority to practice medicine.

The burden of proof is upon A. The case falls within a well-recognized exception to the general rule. As given in Greenleaf on Evidence (Vol. I., Sec. 79) this exception is as follows: "But where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons except those who are duly licensed therefor, as, for selling liquors, exercising a trade or profession, and the like."[14]

14. A, a justice of the peace, and who was also B's general legal adviser, although not an attorney, induced B to execute to him a bond and mortgage to secure an indebtedness which B's son owed A. B now sues A to have the bond and mort-

12—Jones v. Bond, 40 Fed. Rep., 231.

13—Pickup v. Thames Ins. Co., 3 Q. B. D., 594; Deshon v. Merch. Ins. Co., 11 Metc., 199; Tidmarsh v. Wash. etc. Ins. Co., 4 Mason, 439.

14—Williams v. People, 121 Ill., 84; Gt. West. Ry. Co. v. Bacon, 30 Ill. 347; Harbaugh v. City of Monmouth, 74 Ill., 367.

gage cancelled on the grounds of duress and undue influence. The question is, upon whom is the burden of proof.

The burden of proof is upon A. A fiduciary relation existed between him and B. When such relation is shown to exist, the burden is upon the party taking securities or contracts inuring to his benefit, to show that the transaction is just and fair. The rule is not limited to cases between attorney and client, guardian and ward, trustee and *cestui que trust*, or other similar relations, but holds good wherever fiduciary relations exist, and there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding.[15]

15. A, the county treasurer, in an action against him for misappropriating county funds, pleads the Statute of Limitations. The question is, upon whom is the burden of proof.

The Statute of Limitations is an affirmative defense, and A's plea is in the nature of a confession and avoidance. The burden of proof is, therefore, upon him, to show that the money was misappropriated more than the statutory period before the commencement of the action.[16]

16. A sues B on a contract of warranty of the genuineness of an indorsement on a promissory note, sold by B to A. The indorsement is proved a forgery. B's defense is, that in selling A the note and warranting the genuineness of the indorsement he was acting as the agent of C, and that A knew this at the time of the transaction. The court instructs the jury as follows: "The plaintiff is bound to show that he was ignorant that the defendant was dealing for a third party, and if he fails to do so, or, if the jury are unable to say on the whole how this was, the plaintiff is not entitled to recover." The question is, whether the instruction is prejudicial error.

The burden of proof is upon A to establish a contract of warranty by B; and, if the jury are left in doubt upon all the evidence, A must fail. A, however, is not bound to disprove any of the facts from which a contract with C might

15—Fisher v. Bishop *et al.*, 108 N. Y., 25.

16—Kilbourne v. Supervisors, etc., 137 N. Y., 170.

be inferred; and, as the instruction is misleading upon this point, it is prejudicial error.[17]

17. A is indicted and tried for maliciously burning B's barn. In defense, he sets up an *alibi*, and offers evidence tending to show that at the time the barn was set on fire he was so situated that he could not have committed the crime. The question is, upon whom is the burden of proof.

As regards the fact of the *alibi* the burden of proof is upon A; but, upon the whole case, the burden of proof is upon the state to establish A's guilt beyond a reasonable doubt; and if, upon the whole evidence the jury entertain a reasonable doubt as regards A's presence at the fire they are bound to acquit him.[18]

18. A, a commercial traveller, upon arriving at the railway station of a certain city, delivers his baggage to the porter of B's hotel, and rides in B's omnibus to the hotel, where he remains over night in a bedroom in which he locks the door upon retiring. On the way to the hotel A's baggage is lost or stolen, and during the night $400 surreptitiously disappears from his pockets. He now sues B for the value of the baggage and the money taken from his pockets. The question is, upon whom is the burden of proof.

The burden of proof is upon B, both as regards the baggage and the money. He can absolve himself from liability, only by showing that the loss occurred without fault on his part, or that of his servants; or, by the fault of A; or, by superior force.[19]

19. A sues the I. C. Ry. Co. for the value of a warehouse, which was located near defendant's tracks, and which is alleged to have been destroyed by fire caused by sparks from defendant's engine. The question is, upon whom is the burden of proof.

A must prove that the destruction of his warehouse was caused by sparks from defendant's engine. This is sufficient to establish a *prima facie* case of negligence against the com-

17—Wilder v. Cowles, 100 Mass., 487.

18—Com. v. Choate, 105 Mass., 451.

19—Johnson v. Richardson, 17 Ill., 302; Coskery v. Nagle, 83 Ga., 696 (20 Am. St. Rep., 333).

pany. The burden is then upon the company to prove by affirmative evidence that the engine, at the time of the fire, was equipped with the necessary and most effective appliances to prevent the escape of fire, and that the engine was in good repair, and was properly, carefully and skillfully handled by a competent engineer.[20]

20. A sues B to recover damages for the loss and injury of certain articles of household furniture, stored by A with B, some of which are alleged to have been lost, and others damaged, while in B's care. The question is, upon whom is the burden of proof, as regards B's negligence, in respect to the loss and damage of the goods.

Upon this question, the cases are in conflict. According to the Illinois rule, which seems to be the more reasonable one, if the goods, when placed in the hands of the bailee, are shown to have been in good condition, and, when returned, are in a damaged condition, or are not returned at all, the law presumes negligence on the part of the bailee, and imposes upon him the burden of proving that he exercised such care as was reasonably required by the nature of the bailment; and it matters not whether the bailment is one for hire, or, merely gratuitous.[21]

21. A delivers a telegraphic message to the W. U. Tel. Co. in Chicago, directing his banking house in New York to sell 100 shares of certain stock. The message, as delivered in New York, directs the banking house to sell 1,000 shares, and thereupon it sells that amount to a customer, having to go into the market to purchase the residue of 900 shares. The error, in transmitting the message, occasions loss to A, and he sues the company to make the loss good. The question is, upon whom is the burden of proof.

The burden of proof is upon the defendant company. Such a company is bound to exercise a very high degree of care and skill in its efforts to transmit messages correctly. Even when it attempts, by special contract, to exempt itself from liability, it is still liable for mistakes occurring owing to its

20—Ry. Co. v. Quaintance, 58 Ill., 389; Ry. Co. v. Campbell, 86 Ill., 443; Ry. Co. v. Larmon, 67 Ill., 68.

21—Cumins v. Wood, 44 Ill., 416; Bennett v. O'Brien, 37 Ill., 250.

own fault. To permit telegraph companies to secure, by special contract, exemption from the consequences of their own gross negligence is against public policy.[22]

22. A is on trial for rape. His defense is that he was under fourteen years of age when the act was committed. The question is, upon whom is the burden of proof.

The defense set up by A is in the nature of a plea of confession and avoidance, and the burden of proof is upon him. If he establishes his plea, the question will then arise as to whether he knew right from wrong as to the act done, and perhaps as to his physical ability to commit the crime.[23]

23. A sues the I. C. Ry. Co. for loss of freight consigned to a point where there was no depot or agent. The facts show that the car containing the freight reached the destination, and was left there on a side track. The question is, upon whom is the burden to show when the loss occurred.

As no one was at the place, to which the freight was consigned, to receive it, or expected to be there for that purpose, the burden is upon the plaintiff to show that the loss occurred before it arrived at its destination.[24]

24. A sues B for the value of a horse, which he loaned to B without compensation, and which sickened and died while in B's possession. The question is, upon whom is the burden of proof.

B was a gratuitous bailee; and, for this reason, was required to exercise extraordinary care. The burden, in the first instance, is upon A to show the character of the bailment and the death of the horse while in B's possession. It then devolves upon B to show that he exercised that degree of care which is required of a gratuitous bailee.[25]

25. C files a bill in chancery to set aside B's will on the ground of undue influence. A seeks to sustain the will. The question is, upon whom is the burden of proof.

Assuming that A has established, *prima facie*, the validity

22—Tyler v. Ulman & Co. v. W. U. T. Co., 60 Ill., 421.

23—Sutton v. People, 145 Ill., 279.

24—S. & N. Ala. Ry. Co. v. Wood, 71 Ala., 215 (46 Am. R., 309); Woodbury v. Frink, 14 Ill., 279.

25—Bennett v. O'Brien, 37 Ill., 250; Howard v. Babcock, 21 Ill., 259; Hagebush v. Ragland, 78 Ill., 40.

of the will, by proving its due execution and the mental capacity of the testator, the burden of proof is upon C to establish undue influence.[26]

26. A sues B on his promissory note. B defends on the ground that the consideration for the note was illegal, as it was founded upon a gambling contract. The question is, upon whom is the burden of proof.

Where the maker of a promissory note seeks to avoid it on the ground that its consideration is illegal, the burden of proof is upon him to show that fact by a clear preponderance of the evidence.[27]

26—Thompson v. Thompson, 194 Ill., 57.

27—Pixley *et al.* v. Boynton *et al.*, 79 Ill., 351.

ILLUSTRATIONS ON ADMISSIONS.

1. A and his wife sue the town of C for injuries to A's wife, caused by a defect in the highway. The question is, whether an admission by A, who was not present when his wife was injured, that "if the driver of the team had not struck the off horse and made him jump against the near one, the injury would not have happened," is admissible against A.

A's admission, though based upon hearsay, is admissible in evidence against him. The source of his information, upon which the admission is based, is immaterial. The ground of its admissibility is A's adverse interest.[1]

2. A sues B for breach of his contract in failing to discontinue a suit which B had commenced against A, and which B had expressly agreed to discontinue. The question is, whether an admission of B that he had continued the suit against A and obtained a judgment against him, is admissible in this action against B.

B's admission is admissible in this action against him. The so-called parol evidence rule has no application to admissions. The ground of their admissibility is the adverse interest. The fact that B's judgment against A, in the former suit, is a matter of record, is no bar to the admissibility of B's admission in this action.[2]

3. A, the owner of a vessel, is indicted and prosecuted for carrying on the slave-trade. The question is, whether an admission of B, the master of the vessel, and, as such, A's agent, is admissible against A.

B's admission, as to acts within the scope of his agency, is binding upon A. The rule is applicable to both criminal and civil cases.[3]

4. A sues B for breaking and entering his close. B claims that the land in question is a common. The question is, whether an admission of a former owner of the estate, now

1—Shaddock *et ux.* v. Town of Cilfton, 22 Wis., 110; Reed v. McCord, 18 N. Y., Supreme Court, App. Div., 381.

2—Smith v. Palmer, 6 Cush., 513.

3—United States v. Gooding, 12 Wheat., 460.

owned by A, that he had only a right of common in the land in question, is admissible against A, the former owner being in court.

The admission of the former owner is admissible against A owing to the privity of estate between them. The fact that the former owner may be called as a witness in the case is immaterial.[4]

5. A sues B on his negotiable promissory note. C, the original payee, transferred the note to A, after maturity. The question is, whether an admission of C, while owner of the note, that B had paid him a certain sum on it, is binding upon A.

C's admission, according to the better view, is binding upon A owing to the privity of interest between them. Some courts, including those of New York, and the federal courts, hold the contrary.[5]

6. A sues B in replevin to recover possession of certain personal property. B claims the right of possession as mortgagee. A claims that he purchased the property from C before C gave B a chattel mortgage on it. The question is, whether admissions of C, made before he executed the mortgage to B, that he had sold the property to A, are admissible against B.

B's interest in the property is co-extensive with that of C's at the time C executed the mortgage to B. Owing to the identity of interest between C and B, C's admissions, made before he executed the mortgage to B, are binding upon B. Had they been made after the execution of the mortgage to B they would not have been binding upon B, unless made in his presence and not contradicted by him.[6]

7. A as principal, and B as his surety, are sued jointly on their bond of indemnity against loss by the misconduct of A. The question is, whether an admission of A, of his own default, within the scope of the bond, is binding upon B.

4—Woolway v. Rowe, 1 A. & E., 114.

5—Anderson v. So. Chic. Co., 173 Ill., 213; *Contra*, Paige v. Cagwin, 7 Hill (N. Y.), 361; Dodge v. Freedman's Co., 93 U. S., 379.

6—Tynes v. Kennedy, 126 Ind., 523.

A and B are jointly liable on the bond, and therefore A's admission is binding upon B.[7]

8. A made a deed of a certain tract of land to his daughter B. Since A's death, his other heirs claim that the grant to B was an advancement. B denies this claim. The question is, whether admissions of A, made after the grant to B, that he had given all his children equal amounts of property, are admissible against the heirs who claim that the grant to B was an advancement.

Admissions of a grantor, made after parting with the title, are not admissible, against his grantee; but they are admissible against his heirs, claiming adversely to his grantee. Hence A's admissions are admissible.[8]

9. A devised his real estate to seven devisees. The probate of his will is contested on the ground of testamentary incapacity. The question is, whether the admissions of one of the devisees, that A was mentally incompetent when he made his will, are admissible.

As the interests of the devisees are several and not joint, the admissions of one devisee are not binding upon the others; and, as it would be impossible, upon the issue raised, to limit the effect of the admissions so as to restrict it to the devisee who made them, they are inadmissible even against him. But, in the case of a sole devisee, or legatee, his admissions are binding upon him.[9]

10. A, during a controversy with B, offered, by way of compromise, to pay him a certain sum to balance their accounts. B refused A's offer, and brings suit against him. The question is, whether A's offer of compromise is binding upon him as an admission of the amount he owes B.

A's offer to pay B, by way of compromise, is not binding upon A. An offer to pay a sum of money, by way of compromise, is inadmissible; but any independent facts, admitted during the negotiations to effect the compromise, are binding,

7—Singer Manuf. Co. v. Reynolds, 168 Mass., 588.

8—Cline *et al.* v. Jones *et al.*, 111 Ill., 563; Long *et al.* v. Long *et al.*, 19 Ill. App., 383.

9—McMillan *et al.* v. McDill *et al.*, 110 Ill., 47.

unless made for the purpose of the negotiations, and it is fairly to be implied from the circumstances that they were not to be used to the prejudice of the party who made them.[10]

11. A files a bill to contest the validity of B's will, which was duly probated, upon the grounds of mental incapacity of B, and undue influence. The question is, whether the admissions of C, a deceased devisee, are admissible against D, a co-devisee, and who has succeeded by devise to the interest of C.

The admissions of one devisee are not, as a general rule, admissible against his co-devisees; but, as the admissions of privies in estate, made before parting with their interest, are admissible against the parties succeeding to their estate, the admissions of C, in so far as that part of the estate which C devised to D is involved, are binding upon D.[11]

12. A sues B on his promissory note, against which the statute of limitations had run for more than the statutory period. A, several months before, wrote B demanding payment; and B's wife sent A, by mail, $25 in part payment. The question is, whether the part payment by B's wife took the note out of the ban of the statute.

The admissions of a wife are not, on the ground of the marital relation, binding upon her husband. To make them binding she must have express or implied authority from her husband to make them as his agent. The mere fact that B's wife sent A $25 by mail, in part payment of the note, is not sufficient evidence that B authorized the payment, or the letter, so as to make its contents admissible against him.[12]

13. A files a bill against B to restrain him from selling certain real estate, under a trust deed given to secure the payment of money loaned to A. A claims that a large portion of the debt consists of usury, and also that a portion of the sum claimed to be due was never received by her. Before the hearing, A's attorney, C, stipulates and agrees in writing, on behalf of A, that a decree of the court be entered of rec-

10—Gerrish v. Sweetzer, 21 Mass., 373; White v. Old Dom. Co., 102 N. Y., 660.

11—Mueller v. Rebhan, 94 Ill., 142.

12—Butler v. Price, 115 Mass., 578.

ord in favor of B for the whole amount of B's claim, and a decree is entered accordingly. The question is, whether the admission contained in C's agreement, as to the amount due B, is binding upon A.

The admissions of an attorney, acting within the scope of his authority, are binding upon his client. As C's admission is solemnly made of record, within the scope of his authority as attorney, it precludes A from questioning the amount for which consent is given to render the decree.[13]

14. A sues B in trespass for cutting down, and carrying away, certain pine trees. B claims that the trees were cut on his own land. The location of the boundary line between A's and B's land is material to the issue. B offers, against objection, evidence by W, that W requested A to show him the location of the north-east corner of his land; that A told him that T could show him where the corner was; and that T went and showed him. The question is, whether the admissions of T, as to the location of the corner, are binding upon A.

T's admissions are binding upon A. When one party refers another to a third party for information in regard to an uncertain or disputed fact in issue, the admissions of the third party are binding upon the first party to the same extent as if they had been made by himself.[14]

15. B, a surety on A's bond, is sued by C for damages caused by the misconduct of A. The question is, whether admissions of A, relating to such misconduct, and made after the relation of principal and surety between A and B had terminated, are binding upon B.

The admissions of a principal, when made within the scope of the relation of principal and surety, so as to be a part of the *res gestae*, are binding upon the surety; but, as A's admissions were made after the relation had ceased, they are not binding upon B.[15]

13—Haas v. Chicago Bld'g. Society, 80 Ill., 248.

14—Chapman v. Twitchell, 37 Me., 59; Allen v. Killinger, 8 Wall. (U. S.), 480; 1 Greenleaf's Evid., Sec. 182.

15—Chelmsford Co. v. Demarest, 73 Mass., 1; Blair v. Ins. Co., 10 Mo., 559 (47 Am. Dec., 129).

16. A and B were partners. C seeks to recover from B a claim which he has against the firm, but which has become barred by the statute of limitations. The question is, whether an admission of the debt, and a promise to pay it, made by A after the dissolution of the firm, are binding upon B.

One partner, after the dissolution of the firm, has no implied authority to make new contracts, binding upon the firm, nor to make admissions, relating to such contracts. A's promise to pay the firm debt created a new contract, springing out of, and supported by, the original consideration, and was not a mere continuation of the original promise. It follows, therefore, that A's admission of the debt is not binding upon B, nor his promise to pay it.[16]

16—Bell v. Morrison, 26 U. S., 351.

ILLUSTRATIONS ON LAW AND FACT.

1. A, the indorsee of a bill of exchange, which purports to have been drawn in London but which was drawn in Dublin, sues B, the drawer, in assumpsit; and, against objection on the ground that the bill is an inland bill and for this reason insufficiently stamped, offers the bill in evidence. The court, against objection, admits evidence to show that the bill was drawn in Dublin, and then leaves it to the jury to decide whether the bill was drawn in London or in Dublin. The question is, whether the court, in leaving such a matter to the jury to decide, commits prejudicial error.

The admissibility of the bill of exchange in evidence is a preliminary question of fact for the court to decide; and, in leaving it to the jury to decide, the court commits prejudicial error.[1]

2. A is on trial for criminal assault. He objects to the complaining witness testifying against him on the ground of her youthfulness. The court believes her incompetent, but allows her to testify under oath, and instructs the jury that her competency is left to them to decide; that they are to consider her evidence if they find her competent, but are to wholly disregard it if they find her incompetent. A is convicted. The question is, whether the court, in leaving the competency of the complaining witness to the jury commits prejudicial error.

The competency of the complaining witness is a preliminary question of fact for the court to decide; and, in leaving it to the jury, the court commits prejudicial error.[2]

3. A, who claims ownership in a certain meeting-house, sues B in trespass for tearing down a pew in it. In defence, B offers in evidence, against objection, the records of a certain meeting, which the court admits. The objection to the records is, that the application to call the meeting was not signed by five of the proprietors, as required by law. The question is, whether the records are improperly admitted.

The admissibility of the records offered in evidence depends

1—Bartlett v. Smith, 11 M. and W., 483.

2—Com. v. Reagan, 175 Mass., 335.

upon the fact whether the meeting had been called by a proper application, and this is a preliminary question of fact for the court to decide.[3]

4. A is on trial for the murder of B. To show A's motive for killing B, the government offers in evidence, against objection, facts tending to prove the death of C by arsenic, knowingly administered by A. The question is, whether this evidence is admissible, and by whom its admissibility is to be decided.

The admissibility of the evidence depends upon the sufficiency of the proof offered to connect the two crimes; and this is a preliminary question of fact for the court to determine. The jury, however, in case the evidence is admitted, may decide that the proof offered to connect the two crimes is insufficient, and for this reason give no weight to the evidence.[4]

5. A sues B for malicious prosecution. The question is, who must decide the matter of want of probable cause, the court or the jury.

It is the function of the jury to decide what facts are proved, both directly and by inference; and then it is the function of the court, based upon public policy rather than upon principle, to decide whether those facts are sufficient to constitute want of probable cause.[5]

6. A sues B, a minor, for the value of goods purchased on credit. B defends on the ground of infancy. A replies that the goods were necessaries. The question is, whether the fact in issue is to be decided by the court or by the jury.

It is the function of the court in the first instance, to decide whether the goods might, in any case, reasonably be necessaries. Then, if the answer is in the affirmative, it is the function of the jury to decide whether, in the particular case, they are necessaries.[6]

7. A sues the P. & Q. Ry. Co. for damages caused by the

3—Gorton v. Hadsell, 63 Mass., 508.

4—Com. v. Robinson, 146 Mass., 571.

5—Panton v. Williams, 2 Q. B. D., 169; Stewart v. Sonneborn, 98 U. S., 187; Lister v. Perryman, 4 H. L., 521.

6—Ryder v. Wombwell, L. R., 4 Exch., 32.

alleged negligence of defendant. The company denies its own negligence and sets up contributory negligence on the part of the plaintiff. Evidence is submitted by the plaintiff to show defendant's negligence, and by the defendant to show plaintiff's contributory negligence. The question is, what is matter for the court to decide, and what matter for the jury.

As regards defendant's negligence, the court is to decide whether there is evidence upon which the jury could reasonably find negligence. Assuming that there is, and that it is not undisputed, and not conclusive, the jury are to decide whether there was negligence. If the evidence is undisputed and conclusive on this point, the court decides that negligence existed; but the negligence must be so clearly established that no construction of the evidence, or inference drawn from it, warrants a contrary decision. If the evidence is at all conflicting, the question is for the jury to decide. If there is no evidence upon which the jury could reasonably find negligence, the court decides that it did not exist, and gives judgment for the defendant. As regards plaintiff's contributory negligence, the same rules govern.[7]

8. A sues the M. & N. Ry. Co. for damages caused by the defendant's negligence in running its engine into A's buggy while A was attempting to cross its tracks. The company defends on the ground of A's contributory negligence. It is admitted by A that before he attempted to cross the tracks, he failed to look either way for approaching trains. The question is, whether A's alleged contributory negligence is a matter for the court to decide, or, for the jury.

In some states, including Michigan, a rule of law exists which requires persons, before attempting to cross railroad tracks, to look both ways for approaching trains. In some other states, including New York, it has become a postulate, irrespective of any statute upon the subject, that due care requires that such precaution be taken. According to the rule in these states, for the reasons mentioned, A's contributory negligence is established *per se*. In some other states, however, including Illinois,

7—Bridges v. N. L. Ry. Co., 7 H. L., 213; Met. Ry. Co. v. Jackson, 3 App. Cas., 193; Jones v. E. Tenn., etc. Ry. Co., 128 U. S., 443; C. & E. I. Ry. Co. v. O'Conner, 119 Ill., 586; Terre Haute, etc., Ry. Co. v. Voelker, 129 Ill., 540.

no such rule of law, or postulate, exists; and, according to the rule in these states, A's contributory negligence is a matter for the jury to decide.[8]

9. A sues B in assumpsit for breach of a written contract. The question is, what is matter for the court to decide, and what matter for the jury.

The construction, interpretation, and legal effect of the contract are matters for the court to decide. The true meaning of the words in which it is couched, when any doubt exists, and the surrounding circumstances, when material, are matters for the jury.[9]

These rules also govern in the case of oral contracts, when their terms are clear and undisputed.[10]

10. A sues the village of M for damages for personal injuries resulting from a defective sidewalk. Several physicians give expert opinion evidence on behalf of the defendant. The question is, whether the jury are bound to accept as true the expert opinion evidence when opposed to the evidence of other witnesses who claim to have actual knowledge of the facts.

The credibility of witnesses, and the weight to be given their evidence, are questions of fact for the jury to decide. The fact that the witnesses are experts does not change the rule.[11]

11. A, the beneficiary in an accident policy on the life of B, who was killed while attempting to cross a railway track in front of an approaching and visible train, sues the Ins. Co. on the policy. The company defends on the ground that B came to his death in consequence of his failure to observe certain conditions of the policy, viz., "By unnecessary exposure to danger," and by reason of his failure to use, as required by the policy, "all due diligence for personal safety and protection." Evidence is given of the circumstances which surrounded B's death, and the court peremptorily instructs the

8—Stackus v. N. Y., etc., Ry. Co., 79 N. Y., 464; Rodfian v. N. Y. etc., Ry. Co., 125 N. Y., 528; Clark v. B. & M. Ry. Co., 164 Mass., 434; Chase v. Me. Cent. Ry. Co., 167 Mass., 383; Pennsylvania Co. v. Ivana, 112 Ill., 398.

9—Hutchinson v. Bowker, 5 M. and W., 535; Coupe v. Roger, 155 U. S., 565.

10—Spragins v. White, 108 N. C., 449.

11—Olson v. Vil. of Manistique, 110 Mich., 656.

jury to find for the plaintiff. The question is, whether the court commits prejudicial error in not leaving the case to the jury to decide.

Assuming that there is some evidence upon which the jury could reasonably find negligence on the part of B, the court commits prejudicial error.[12]

12. A sues the C. & A. Ry. Co. to recover the value of a hotel which is alleged to have been destroyed by fire owing to defendant's negligence in using wood for fuel in one of its coal-burning engines. Among others, the court gives the following instruction:

"The use of wood for fuel, in an engine built for and as a coal-burning engine, is negligence, if the jury believe, from the evidence, that the engine was constructed so as to burn coal, and not so constructed as to burn wood with as much safety as coal. But such negligence can not be such as to render defendant liable, (if proven,) unless it is further proven, to the satisfaction of the jury, that the use of such engine, by burning wood therein, caused the injury complained of in the declaration." The question is, whether this instruction is erroneous on the ground that it takes from the jury a question of fact.

Negligence is the absence of such conduct as would reasonably be expected from a person under the particular circumstances involved. Its definition is a question of law; but the standard to be used in a particular case is a matter of reason, based upon general experience. The court may define negligence, but it may not instruct the jury that certain acts constitute negligence. Negligence is a fact to be proved like any other fact. The court's instruction is erroneous because it takes from the jury a question of fact which it is their province to determine.[13]

13. A, a watchmaker and jeweler, sues the K. & S. Ry. Co. for the value of lost baggage, which consisted of certain tools used by A in repairing watches. The question is, what is matter for the court to decide, and what matter for the jury.

12—Columbian Accident Co. v. Sanford, 50 Ill. App., 424.

13—C. & A. Ry. Co. v. Pennell 94 Ill., 448.

What constitutes "baggage," is a mixed question of law and fact, to be determined by the jury under proper instructions by the court. The term has a technical meaning, and its definition is a question of law for the court; but, whether the tools in question come within the definition or not, is a question of fact for the jury to decide.[14]

14. A sues the G. Fire Ins. Co. upon a policy containing a provision that the policy would be void if there was any other existing insurance on the property not assented to by the defendant company. A prior policy, in a different company, is introduced in evidence, and this policy contains a provision that it would become void in case of the vacancy of the premises for ten days without the written consent of the company indorsed thereon. There is conclusive evidence that the premises were vacant for more than ten days, and some evidence tending to show that the company which issued the prior policy, waived its right to avoid it, before the issuance of the policy now sued upon. The court, on behalf of A, instructs the jury that if the premises were vacant for more than ten days prior to the date of the policy sued upon, without the consent of the other company, then the policy first issued became, and was, thenceforth void, and the same no longer constituted insurance on the building. The question is, whether the court, in giving this instruction, usurps the province of the jury.

As there is some evidence tending to show that the breach of the condition in the prior policy was waived, and, as the question of waiver is a question of fact for the jury to decide, the court's instruction is prejudicial error.[15]

15. A, who was the foreman of a section gang of track repairers, was struck by a heavy piece of coal which was thrown, or which fell, from the engine or tender of a rapidly passing train, and was killed. B, his administrator, now sues the railway company for damages, alleging that A's death was caused by the negligence of defendant's fireman who was on the engine. The company defends on the ground that A and the fireman were fellow-servants. The court instructs the jury

14—K. C., F. S. & G. Ry. Co. v. Morrison, 34 Kan., 502 (55 Am. Rep., 252).

15—Germania Fire Ins. Co. v. Klewer, 129 Ill., 599.

"that a man employed by a railroad company in the capacity of a section foreman, having charge and oversight of repairs upon a certain portion of its track, is not engaged in the same line of duty with an engineer and fireman running such company's locomotive engines, and is therefore not within the rule which exempts the common employer from liability to one of its employees for damages resulting from the fault, carelessness or negligence of a fellow-servant or co-employee." The question is, whether the court usurps the function of the jury.

The question, whether A and the fireman were fellow-servants, is one of fact for the jury to decide, and not one of law for the court. The instruction, therefore, is prejudicial error.[16]

16. A sues a railway company for the value of lost baggage. The question is, whether A called for his baggage within a reasonable time after it had reached its destination, the answer to which determining the degree of care required on the part of the company.

What constitutes a reasonable time within which a passenger should call for his baggage is a mixed question of law and fact, depending very much upon the peculiar facts of each individual case; but where the facts are undisputed, it is purely a question of law for the court to decide.[17]

17. A sues B, the indorser of a promissory note. B defends on the ground that proper demand and notice were not made and given. The question is, whether the seasonableness of the demand and notice is a question of law or a question of fact.

Where the facts, as to the situation of the parties, frequency of communication, etc., are admitted, or established by undisputed evidence, the seasonableness of the demand and notice is a question for the court to decide; but, if the evidence upon these matters is conflicting, the question is one for the jury.[18]

18. A and B are tried jointly for the murder of C. The question is, whether it is the duty of the jury to receive from

16—C. & N. W. Ry. Co. v. Moranda, Admx., 108 Ill., 576.

17—C. R. I. & P. Ry. Co. v. Boyce, 73 Ill., 510.

18—Hadduck v. Murray, 1 N. H., 140 (8 Am. Dec., 43).

the court the law bearing upon the case, and to apply it as given by the court.

In the federal courts, it is the duty of the jury, in criminal cases, to receive the law from the court, and to apply it as given by the court, subject to the condition that, by a general verdict a jury of necessity determines both law and fact as compounded in the issue submitted to them in the particular case.[19] This is also the rule in the English courts, and the great weight of authority in our state courts. It is in accord with the fundamental maxims of the common law, and with the spirit and meaning of the United States Constitution. In Illinois, the criminal code provides that juries, in all criminal cases, shall be judges of the law and fact.[20] The constitution of Louisiana has a provision to the same effect, but the courts of that state hold that juries are bound to take the law from the court.[21] Greenleaf says, "Where the question is mixed, consisting of law and fact, so intimately blended as not to be easily susceptible of separate decision, it is submitted to the jury, who are first instructed by the judge in the principles and rules of law, by which they are to be governed in finding a verdict, and these instructions they are bound to follow."[22] Starkie says, "Where the jury find a general verdict they are bound to apply the law as delivered by the court, in criminal as well as civil cases."[23]

19. A is on trial for an alleged violation of the license laws. A statute provides that, "In all trials for criminal offences, it shall be the duty of the jury * * * , after having received the instructions of the court, to decide at their discretion, by a general verdict, both the fact and the law involved in the issue, or to find a special verdict, at their election." The question is, whether counsel of the defendant have a right to address the jury upon the questions of law involved in the issue.

It is the duty of the court to instruct the jury on all questions of law pertaining to the case, and the duty of the jury

19—Sparf and Hansen v. United States, 156 U. S., 1.

20—Rev. Stat. (1903), Hurd, Chap. 38, Div. XIII., Sec. 11.

21—State v. Tisdale, 41 La. An., 338.

22—Greenl. Ev., Vol. I, Sec. 49, 157.

23—Starkie on Evid., p. 816.

to receive the law from the court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts. The jury have no legitimate right to contravert such instructions, nor to decide the case contrary to them. But, as they have a legitimate power to return a general verdict, in which case they must pass upon the whole issue, counsel for the defendant, under the general superintendence of the court, have a right to address the jury upon the questions of law involved in the issue.[24]

24—Com. v. Porter, 10 Metc., 263; Com. v. Anthes, 5 Gray, 185.

ILLUSTRATIONS ON DEMURRERS TO EVIDENCE.

1. A sues B for rent, and seeks to establish his right by prescription. He puts in evidence a deed dated 1842, whereby a former prior of Caldwell granted an annual rent of 20s. to A's predecessor. B demurs to A's evidence, but A refuses to join, and the question is, whether the court will compel him to do so.

Formerly the court would not compel a joinder in demurrer; but, according to the later rule, if the facts are clear and definite, it will.[1]

2. A, the indorsee of a bill of exchange, sues B, the acceptor. A's evidence is partly real and circumstantial. B demurs to it. The question is, whether A is obliged to join in the demurrer.

When the evidence is a matter of record, or other matter in writing, the demurree must join, or waive the evidence. When the evidence is real, and the facts numerous, vague and uncertain, the demurree is not obliged to join, unless the demurrant distinctly admits upon the record every fact, and every conclusion which the evidence offered conduces to prove; but, when the facts are clear, certain and definite, he is obliged to join. As A's evidence is partly circumstantial, he is not obliged to join in B's demurrer, unless B admits upon the record every fact and every conclusion which the evidence conduces to prove.[2]

3. A sues the K. Ry. Co. to recover the value of three mares which were killed owing to the alleged negligence of the defendant. He introduces direct and circumstantial evidence sufficient to prove all the material facts of the case *prima facie*, and also the direct evidence of one witness which contradicts some of the circumstantial evidence. The defendant demurs to this evidence, and the court overrules the demurrer. The case is then given to the jury, who return a verdict in favor of the

1—The Prior of Tikeford v. The Prior of Caldwell, Com. Pleas (1456), 34 Hen. VI.

2—Gibson v. Hunter, H. L. (1793), 2 H. Bl., 187.

plaintiff. The question is, whether the court's action, in overruling the demurrer, is ground for reversal.

Where a plaintiff introduces evidence sufficient to prove all the material facts of his case *prima facie*, some of which facts, however, are proved only by circumstantial evidence, and also introduces the direct evidence of one witness which contradicts some of the facts proved by the circumstantial evidence, and no other evidence is introduced in the case, the court may rightfully overrule a demurrer to the evidence, and may also rightfully sustain a verdict found by the jury in favor of the plaintiff.[3]

4. A sues B on a lost promissory note. After A submits his evidence, which is oral, and partly circumstantial, B demurs to it. The demurrer states and admits A's evidence, but fails to admit conclusions which it conduces to prove. A is compelled to join in the demurrer, and the court sustains it. The question is, whether the court's ruling, in compelling A to join in the demurrer, is ground for reversal.

Where the evidence is oral, and indeterminate and circumstantial, and the demurrant does not admit upon the record the facts and the conclusions which the evidence tends to prove, and the court compels a joinder, a judgment in favor of the demurrant will be reversed.[4]

5. A sues the O. & M. Ry. Co. to recover damages for a personal injury caused by defendant's negligence. After A puts in his evidence and rests, the defendant demurs to it. The demurrer admits the truth of A's evidence, but not the facts which it conduces to prove. A voluntarily joins in the demurrer, and judgment is given in favor of the defendant. The question is, whether the failure of the demurrer to admit facts which the evidence conduces to prove is ground for a reversal of the judgment.

Since A's joinder in the demurrer is voluntary, he cannot raise the objection that the demurrer admits the evidence, and not the facts which the evidence conduces to prove.[5]

3—The Kan. City, etc., Ry. Co. v. Foster, 39 Kan., 329.

4—Dormandy v. State Bank, 2 Scam. (Ill.), 236.

5—Valtez v. O. & M. Ry. Co., 85 Ill., 500.

6. A sues the I. & S. L. Ry. Co. for damages to his property owing to defendant's negligence. After A rests, the defendant demurs to his evidence, and A voluntarily joins in the demurrer. The demurrer is so badly drawn as to leave the rights of the parties doubtful. The court, however, overrules the demurrer, and enters judgment for the plaintiff. The defendant appeals, and the question is, what ruling should be made by the appellate court.

When the demurrer to evidence is insufficient to bring the facts in the case before the court for its judgment, it will be treated as a nullity, the judgment reversed, and the cause remanded with directions to the court below to award a *venire de novo*. The fact that the plaintiff voluntarily joins in the demurrer will not justify the court in passing upon the merits of the case if the demurrer is so badly drawn as to leave the rights of the parties doubtful. The office of a demurrer to evidence is to withdraw the case on trial from the jury, and present to the court, in a formal manner, such facts as are actually established, and such other facts as the evidence offered conduces to establish, for the purpose of obtaining the judgment of the court as to their legal sufficiency. If the merits of the case are substantially presented by the demurrer, the court may properly decide the case; but, if it is so inartificially drawn, and the facts or evidence so improperly stated as to leave the rights of the parties doubtful, then the court should not pass upon the merits of the case, and to do so would be ground for a reversal of the judgment. A demurrer to evidence should state facts, and not the evidence which tends to prove these facts; and where the evidence is oral, and merely tends to prove or disprove some material fact or facts in issue, the demurrer should not set out the evidence, but the fact or facts it tends to establish; and if it does not, it is informal and insufficient, and the plaintiff is not bound to join in it.[6]

7. The plaintiff, which is a state bank, and the indorsee and holder of G's promissory note, sues G on the note, in assumpsit. After the bank rests, G demurs to its evidence, and the bank joins in the demurrer. The court overrules the demurrer and

6—I. & St. L. Ry. Co. v. Link, 10 Ill. App., 292; Crowe v. People, 92 Ill., 231.

enters judgment for the plaintiff, the jury assessing the damages. G appeals on the ground that the evidence of the plaintiff fails to prove the act of its incorporation. Assuming that it does not, and that proof of such fact is an essential element of the plaintiff's case, the question is, what order should be made by the higher court.

The objection made by G cannot be raised on a demurrer to evidence. Instead of demurring to the evidence, he should apply for a nonsuit. The practice of resorting to a demurrer to evidence, when the defendant discovers some inadvertence or oversight of the plaintiff, is not encouraged. If the defendant applies for a nonsuit, it is discretionary with the court to allow the plaintiff to introduce further evidence. The court usually grants such permission, unless it occasions surprise or injury to the opposite party. If such permission is granted, and the party fails to supply the defect in his evidence, and the nonsuit is granted, the plaintiff will not lose his debt, but merely be liable for the costs of the suit. Whereas, if a judgment is entered upon the demurrer to evidence, against the plaintiff, he loses his debt. The rules of law for the regulation of trials are designed to facilitate and promote justice, and not to ensnare the unwary. For the reasons stated, the appellate court will affirm the judgment.[7]

8. A sues the N. E. Ins. Co. on a policy of marine insurance. He introduces a mass of circumstantial, loose and indeterminate evidence. The defendant company files an inartificially drawn demurrer to this evidence, and A joins in the demurrer. Judgment is entered upon the demurrer, and the case is reviewed by a higher court. The question is, should the judgment on the demurrer be allowed to stand.

What is usually called a demurrer to *evidence* is, in reality, a demurrer to the *facts established by the evidence.* The true purpose of the demurrer is to refer to the court the application of the law to ascertained and admitted facts. The sole function of the court is to apply the law to the facts. It is not concerned in investigating disputed facts, or, in weighing the force of testimony, or presumptions arising from the evidence. Its duty is to determine the legal sufficiency of the facts

7—Gillham v. State Bank, 3 Ill., 246.

which the evidence tends to prove, and which are admitted to be true. A demurrer to evidence admits not only all the facts directly stated in it, but also all which the evidence legally conduces to prove. The demurrant cannot avail himself of any facts which the evidence tends to prove in his own favor. Such facts he is deemed to have waived. If the evidence is circumstantial, or uncertain, demurring to the evidence generally is not sufficient. The facts which the evidence tends to prove in favor of the demurrer should be stated with certainty, and admitted. Before a judgment can be entered on the demurrer, joinder is always essential; and so long as any matter of fact in controversy exists between the parties, no issue can be joined on the demurrer. If, in such respects the demurrer is defective, and judgment is entered upon it notwithstanding, a higher court, upon reviewing the case, will reverse the judgment and award a new trial.

Since, in the present case, the demurrer to the evidence is so informally framed, and the facts stated in it are so uncertain, the judgment entered upon it should be reversed, and a *venire facias de novo* awarded.[8]

9. A is on trial for criminal libel. After the people rest, A declines to offer any evidence, and files in the case a certain paper which is marked "demurrer to evidence," and which consists of a manifestly imperfect and partial statement of the evidence, to which is subjoined a formal demurrer to the facts therein stated. The people join in the demurrer, and the court thereupon withdraws the case from the jury, and the jury are discharged. Subsequently, judgment is entered upon the demurrer to the evidence against A, and he appeals. The question is, what order should be made by the higher court.

A demurrer to evidence should state facts, and not the evidence which tends to prove those facts. If the evidence is oral, and merely tends to prove or disprove some important fact or facts in issue, the demurrer should not set out the evidence, but the fact or facts which it tends to prove; and if it does the former, it is informal and insufficient. If, upon examining the evidence set out in the demurrer, it appears that the merits of

8—Copeland v. New Eng. Ins. Co., 39 Mass., 135; J., A. & N. Ry. Co. v. Velie, 140 Ill., 59; Fowle v. Com. Council of Alexandria, 24 U. S., 319.

the controversy are substantially presented by it, the court may properly decide the case; but, if the demurrer is so informally drawn, and the facts so improperly stated as to leave the rights of the parties doubtful, it is error for the court to pass upon the merits of the case. Its sole duty is to apply the law to the facts.

In the present case, the demurrer to the evidence is so inartificially drawn, and the facts set forth in it so incomplete, as to render it a nullity. The judgment upon it, therefore, should be reversed, and a *venire facias de novo* awarded.[9]

10. A sues B in equity to compel him to specifically perform a certain written agreement. After A rests, B demurs to his evidence, and A joins in the demurrer. The court sustains the demurrer and renders judgment upon it in favor of B. A appeals. The question is, what office does a demurrer to evidence perform in a suit in equity; and should the judgment upon B's demurrer to the evidence be allowed to stand.

Since, according to the English rule, a verdict by a jury in a suit in equity is merely advisory, and not conclusive upon the chancellor, the purpose of a demurrer to evidence is difficult to perceive. Its effect, however, upon joinder by the demurree, is the same as in an action at law. The facts set forth in the demurrer, and those which such facts conduce to prove, are admitted to be true.

In the present case, if the facts set out in the demurrer, and those which such facts conduce to prove, are sufficient to establish A's case *prima facie*, the judgment should be reversed. If they are not, the judgment should stand.[10]

9—Crowe v. People, 92 Ill., 231.

10—Healey v. Simpson, 113 Mo., 340.

ILLUSTRATIONS ON FACTS EXCLUDED ALTHOUGH LOGICALLY RELEVANT.

1. A sues B for damages for injuries caused to him by defendant's negligence in providing an unsafe and defective machine, whereby one of the pulleys, over which ran the belt which transmitted power to a saw A was operating, fell upon and seriously injured him. The question is, whether a subsequent alteration or repair of the machine by B is competent evidence of negligence in its original construction.

Such evidence is incompetent. It has no legitimate tendency to show that B had been negligent before the accident, tends to create against B a prejudice in the minds of the jury, and is calculated to distract their minds from the real issue.[1]

2. A sues B for damages for injuries caused to him by defendant's negligence in providing an unsafe and defective elevator, which fell five stories and seriously injured A. Shortly after the happening of the accident, B had an air-cushion put in the elevator shaft, and the question is, whether such fact is competent evidence.

The question of negligence should be determined by what occurred before, and at the time of, the accident. New measures or devices, adopted after the accident, do not necessarily imply that all previous devices or measures were insufficient. Evidence of precautions taken after an accident is liable to be misinterpreted by the jury as an admission of negligence. A person operating a passenger elevator, however, is bound to avail himself of all new inventions and improvements known to him, which will contribute materially to the safety of his passengers, whenever the utility of such has been thoroughly tested and demonstrated, and their adoption is within his power, so as to be reasonably practicable. Evidence that a valuable device for securing safety was known to A, and its use neglected by him, before the accident, would be competent; but the mere fact that

1—The Columbia, etc., Ry. Co. v. Hawthorn, 144 U. S., 202; Corcoran v. Peekskill, 108 N. Y., 151; T. H. & I. Ry. Co. v. Clem, 123 Ind., 15.

after the accident he had an approved device put in, is incompetent.[2]

3. A sues the village of B for damages for injuries caused to her by a defective plank in the village sidewalk. The question is, whether evidence that, shortly after the accident, the defective plank was replaced by a new one by the village authorities, is competent; whether, assuming it to be incompetent, its admission is ground for reversal, provided there is abundant proof of the existence of the defect prior to the accident; and, whether evidence that other persons had stepped into the same hole in the walk, prior to A's injury, is competent.

Evidence that the defective plank was replaced shortly after the injury, is incompetent; but its admission, in view of the fact that abundant proof is given of the existence of the defect prior to the accident, is error without prejudice, and therefore not ground for reversal. Evidence that other persons had stepped into the same hole prior to the accident is competent owing to its bearing upon the existence and character of the defect.[3]

4. A sues the T. Electric Ry. Co. for damages for causing the death of his infant son by negligently running over him with one of its cars. The question is, whether the fact that the defendant company, shortly after the accident, virtually discharged from his regular employment the motorman who was in charge of the car at the time of the accident, is competent evidence to prove by implication that the company considered that he had been careless or was incompetent.

Taking additional precautions, after an accident, to prevent other accidents, is not admissible in evidence for the purpose of proving the existence of negligence at the time of the accident. To admit such evidence would tend to discourage the adoption of additional safeguards by improving the quality and raising the standard of such service. Besides, such evidence has a strong tendency to unduly prejudice the minds of the jury against the defendant.[4]

5. A sues B in assumpsit for breach of his agreement to pur-

2—Hodges v. Percival, 132 Ill., 53; Shinners v. Prop. of L. & C., 154 Mass., 168.

3—Lombar v. The Village of East Tawas, 86 Mich., 14.

4—Hewitt v. Taunton Street Ry. Co., 167 Mass., 484.

chase from A all the beer he would need in his business. B defends on the ground that the beer which he refused to buy from A was not of a fair merchantable quality. To prove that it was, A offers evidence of the good quality of the beer he furnished other publicans at the time B refused the beer offered to him. The question is, whether such evidence is legally relevant.

The evidence offered by A is too conjectural, and strongly liable to mislead the jury. For this reason it is inadmissible. If it had been established that the beer B refused, and that furnished by A to the other publicans, had been taken from the same vat of beer, the evidence would be admissable. Again, as this is a civil case, and as A's reputation for supplying good beer is not in issue, the fact that A has such a reputation is legally irrelevant.[5]

6. A sues the L. Gas Light Co. for damages for injuries to her health caused by the inhalation of gas which escaped from defendant's pipe. The question is, whether evidence is admissible that wherever the gas, which escaped from a defect in defendant's pipe, entered any dwelling house in the neighborhood, sickness followed.

Such evidence is too conjectual and tends to mislead the jury. It also tends to complicate the issue and thus confuse the jury. The attending circumstances in the various cases may be quite different. The evidence, therefore, is inadmissible.[6]

7. A, while visiting for several days at B's house, became ill from inhaling gas which had escaped from a defective pipe of the gas company. He went home where he continued ill for several weeks. He now sues the gas company for damages for his injuries. The question is, whether evidence is admissible, that B and his family had been in perfect health up to the time when the gas began to escape into their house, and that immediately, or soon after, every member of the family became seriously sick.

The mere sickness of B and his family is a collateral fact; but the circumstances attending its inception are the same as those attending that of B's sickness. Hence the jury are not liable to be mislead or confused by the evidence in question. It is admissible, however, merely for the purpose of showing the nature of

5—Holcombe v. Hewson, 2 Camp., 391.

6—Emerson v. Lowell Gas Co., 3 Allen, 410.

the gas which came into the house, to the influence of which all the inmates were subjected alike, and should be limited to the effect of the gas upon those who in common and under similar circumstances inhaled it.[7]

8. A, while leaving a lecture hall on a dark night, and in a large crowd, fell into an area or passageway leading to a cellar under the hall, and was seriously injured. She sues the owners of the hall for damages, alleging negligence in failing to have the area properly lighted. The defendant offers to prove that more than ten thousand persons had passed and repassed the area every year since the hall was built without accident. The question is, whether such evidence is legally relevant.

The evidence tendered is evidence of collateral facts. If it is incapable of affording any reasonable inference as to the fact in issue, it should be excluded. If, however, it is capable of affording such inference, and is not too conjectural, and liable on this ground to mislead the jury, nor apt to confuse the jury unduly by complicating the issue, it should be admitted. The more conservative courts usually exclude this class of evidence;[8] while the more liberal ones usually admit it.[9]

9. A sues B to recover the value of a certain piece of land. To prove the value of this land A offers evidence of recent sales of several pieces of land in the vicinity, and the prices realized. The question is, whether such evidence is legally relevant.

According to the better view, such evidence is excluded.[10] It is conjectural, and also tends to complicate the issue and thus confuse the minds of the jury. Then again, better evidence is usually available, viz., the opinions of persons competent to judge of such value. In some jurisdictions, however, including Illinois[11] and Massachusetts,[12] such evidence is held admissible.

10. A sues B, a drover, for the value of two steers which A intrusted to him, and which escaped from B's drove of cattle and

7—Hunt v. Lowell Gas Co., 8 Allen, 169.

8—Temperance Hall Assoc. v. Giles, 33 N. J. L., 260.

9—Crafter v. Metrop. Ry. Co., L. R., 1 C. P., 300.

10—In re Thompson, 127 N. Y., 463; Penn. S. V. R. Co. v. Ziemer, 124 Pa. St., 560.

11—Peoria G. & C. Co. v. Peoria Term. Ry. Co., 146 Ill., 372.

12—Paine v. Boston, 4 Allen, 168; Gardner v. Inhab. of Brookline, 127 Mass., 358.

were lost. A alleges that the loss was occasioned by B's negligence in delaying, after discovering their escape, to search for them. B requests the court to instruct the jury that, "if he did do the things that drovers of common prudence, engaged in the same business, ordinarily do, he was not guilty of such negligence as will make him liable in this action." The court refuses to give this instruction, and the question is, whether such refusal is ground for reversal.

B was bound to exercise reasonable care. The usual practice of other drovers of common prudence might fall short of this. Such practice, therefore, is not a rule of law to govern the jury. Hence the instruction requested was properly refused. Evidence, however, of the usual practice of others, in the same line of business and in the same locality, is generally held admissible. Its weight, of course, is a question of fact for the jury.[13]

11. A sues the H. Ry. Co. to recover the value of a building and its contents, which he alleges were destroyed by fire owing to defendant's negligence in carelessly and unskillfully operating an imperfect locomotive engine. There is no evidence of any other cause or circumstance of suspicion. He offers to prove by a witness who lived close to the railroad, and about one-fourth of a mile from the building, that shortly before it was burned he had seen sparks and fire thrown, from the engines used by the defendants' trains in passing through witness' premises, a greater distance than this building stood from the track of the railroad; and that he had picked up from the track, after the passage of the trains, lighted coals more than two inches in length. This evidence is objected to and the objection is sustained. A also offers evidence which tends to prove that the engines used by the defendants lacked some apparatus which was in use upon some other locomotive engines, and which rendered the latter less liable to communicate fire to substances at the side of the road than those which were without such apparatus. This evidence is admitted, but the court finally nonsuits the plaintiff. The question is, whether the court's ruling, in excluding the former evidence, is prejudicial error, and whether the latter evidence is legally relevant.

13—Maynard v. Buck, 100 Mass., 40; Wabash Ry. Co. v. McDaniels, 107 U. S., 454; Grand Trunk Ry. Co. v. Richardson, 91 U. S., 454.

The court's ruling, in excluding the former evidence, is prejudicial error. After the plaintiff refutes every other probable cause of the fire, he establishes a *prima facie* case by showing that, about the time the fire occurred, the company's trains, which ran past the location of the fire, were so negligently managed as to be likely to set on fire objects not more remote than the property burned. The latter evidence is legally relevant. The fire is alleged to have been caused by carelessly and unskillfully operating an *imperfect* engine. Owing to the hazardous nature of the business, an essential of due care is the use of the most approved methods and appliances. Hence, evidence that safer and better appliances were used by others, in the same line of business, of which fact defendant was reasonably charged with notice, and that such appliances were available, is admissible to show defendant's negligence.[14]

12. A sues the L. E. & W. Ry. Co. to recover the value of an elevator destroyed by fire owing to the alleged negligence of defendant in operating a *certain* engine. He offers rebuttal evidence, that other fires had been caused by defendant's engines, in the immediate vicinity of the elevator destroyed, both before and after it was destroyed, but the court excludes this evidence, and the question is, whether the court's ruling is prejudicial error.

Since the engine which is alleged to have caused the fire is *identified*, evidence of defects in other engines, or of other fires caused by other engines, before or after the fire complained of, is legally irrelevant. The court's ruling, therefore, in excluding the evidence offered, is correct. Where, however, there is no proof as to what engine caused the fire, but sufficient circumstantial evidence to establish a strong probability that it was caused by one of defendants' engines, evidence that sparks and burning coals were frequently dropped by defendants' engines, on the same line, at other times and places, and also that defendants' engines were not equipped with the most approved appliances conducive to safety, is legally relevant to prove habitual negligence.[15]

13. A is on trial for feloniously receiving fifty yards of cloth,

14—Sheldon v. The H. R. Ry. Co., 14 N. Y., 218.

15—First Nat Bank v. L. E. & W. Ry. Co., 174 Ill., 36.

stolen from B in March. The prosecution offers evidence that a week after the cloth was stolen it was found in A's possession, and that within an hour afterward his house was searched and that two pieces of cloth, stolen from C, in December next preceding, were found in the house; and also that during that month A had been in possession of two other pieces of cloth, which were stolen from C when the other two pieces were stolen from him. The question is, whether evidence of the possession by A of the four pieces of cloth stolen from C is legally relevant.

Since the purpose, in offering this evidence, is to show A's guilty knowledge, upon principle it should be held admissible. In this class of cases, however, courts usually exclude such evidence on the ground that it is too conjectural, and also because it complicates the issue; but in England, by statute, it is made legally relevant for the specific purpose stated, viz., to show guilty knowledge.[16]

14. A sues the District of C. for damages for injuries received from a fall occasioned by the alleged negligence of the defendant in maintaining a dangerous sidewalk. He offers evidence that other persons stumbled and fell at the same place where he was injured, and the question is, whether this evidence is legally relevant.

Evidence of the mere fact that others fell at the same place where A fell is not too conjectural to render it legally irrelevant; nor is it objectionable because it complicates the issue. The *particulars* of the other cases, however, would complicate the issue to such an extent as to be liable to confuse the jury, and for this reason such evidence would be inadmissible.[17]

15. A sues the city of C. for damages for negligently causing the death of B by failing to keep properly lighted the approach to a certain swing-bridge. He offers to prove that another person, at the same place and under similar circumstances had met with a similar accident. The question is, whether this evidence is legally relevant.

The answer to question 14 is applicable to this one.[18]

16—R. v. Oddy, 2 Den. C. C., 264; 34 and 35 Vict., C. 112 (1871).

17—District of Columbia v. Armes, 107 U. S., 519.

18—City of Chicago v. Powers, 42 Ill., 169.

16. A is on trial for an attempt to obtain money from B by false pretenses, by trying to pledge to him a worthless ring as a diamond ring. For the purpose of showing A's knowledge of the quality of the ring, the prosecution offers evidence that, two days before, A tried, on two separate occasions, to obtain from C and D, respectively, money, by making similar misrepresentations as to the same or a similar ring; and that, on the same day that he tried to obtain money from B, he obtained money from E by pledging, as a gold chain, one which was only gilt. The question is, whether the evidence, in each of these cases, is legally relevant.

As a general rule, similar acts of a party which cause injuries to third persons, are not admissible; but when the purpose of introducing such acts in evidence is to show that the act charged was intentional, they are held to be legally relevant.[19]

17. A is on trial for obtaining money from B by falsely representing to B that C had authorized him to obtain it. The prosecution offers evidence that A, upon another occasion, obtained money from D by a similar false pretense. The question is, whether this evidence is legally relevant.

The evidence is not legally relevant, because A's knowledge of his lack of authority in the one case is not connected at all with his knowledge of his lack of authority in the other case.[20]

18. A sues B for damages for injuries caused by B's dog biting him. A alleges that B had knowledge of the ferocity of the dog, and to prove this he offers evidence that the dog had previously bitten C, D and E, and that they had complained to A about it. The question is, whether this evidence is legally relevant.

Since the purpose of the evidence is to show A's knowledge of the dog's ferocity, it is legally relevant to show that fact. But, as evidence of the *particulars* of those cases would unduly complicate the case, such evidence would be inadmissible.[21]

19. A is on trial for feloniously setting fire to his own house to obtain the insurance on it. The prosecution offers evidence that A had previously lived in two other houses, each of which

19—R. v. Francis, L. R., 2 C. C. R., 128.

20—R. v. Holt, Bell C. C., 280.

21—Roscoe's Nisi Prius, 739.

he had insured in a different company, each of which was burned while occupied by him, and that, upon the policy on each he obtained the insurance. The question is, whether the evidence offered is legally relevant.

As the purpose of this evidence is merely to show that the offence charged was intentional and not accidental, it is admissible to show that fact. Evidence of the *particulars* of the two former fires, however, is inadmissible as it would unduly complicate the case.[22]

20. A, who was B's paymaster, and whose duty among others, was to make entries in a book kept for the purpose, showing the various amounts paid by him to B's employees, is charged with having made a false entry to his own advantage. Evidence is offered against him that, at various times during the two years next preceding, he made other similar false entries, all in his own favor. The question is, whether this evidence is legally relevant.

The evidence offered relates to different transactions from the one charged, but its purpose is merely to show that the one charged was intentional and not accidental. To show this fact, therefore, the evidence is legally relevant, but not to show facts beyond this.[23]

21. A sues B for damages for an injury occasioned by defects in the highway, consisting of a pile of lumber likely to frighten horses, and an insufficient bridge railing. A offers evidence that C's horse, an ordinarily gentle one, while being driven by the pile of lumber, also became frightened at it. The question is, whether this evidence is legally relevant.

The character of the pile of lumber, as regards its tendency to frighten horses, was a fact in issue. The rule which excludes experimental knowledge, in cases like this, is not an arbitrary and technical one, but rather one of reason. As the evidence offered is not liable to mislead or confuse the jury, and as it is reasonable evidence to show the tendency of the pile of lumber to frighten horses, it is legally relevant.[24]

22—R. v. Gray, 4 F. and F., 1102.
23—R. v. Richardson, 2 F. and F., 343.
24—Darling v. Westmoreland, 52 N. H., 401.

22. A is on trial for the murder of her husband by administering to him poison while at his meals. To show that the poison was given intentionally and not accidentally, the prosecution offers evidence that the same kind of poison was administered by A at various times during the next six months following to her three sons, B, C and D, while at their meals, as a result of which B and C died, and that the meals of all four, in every case, were prepared by A. The question is, whether this evidence is legally relevant.

Similar acts of a party, which cause injuries to third persons, are, as a general rule, inadmissible; but when such acts, together with the act charged, form a series, and the question is, whether such acts were intentional, negligent or accidental, evidence of the similar acts of the series are legally relevant. The evidence offered is therefore admissible for the purpose intended, but its application must be limited to this.[25]

23. A is on trial for the murder of her sister's husband, B. To show motive, the prosecution offers evidence that A, being in debt, formed, and effectually carried into execution, the scheme of first poisoning B's wife, who was the beneficiary named in a policy of insurance on B's life, then inducing B to make her his beneficiary, and then poisoning B. The question is, whether this evidence is legally relevant.

When a party is charged with the commission of one crime, evidence that he has committed another crime is usually inadmissible; but when the crimes are so connected as to form part of the same plan or scheme, such evidence is admissible to show motive. Hence all of A's acts, which formed links in the chain which comprised her scheme, are legally relevant.[26]

25—R. v. Geering, 18 L. J. M. C., 215; R. v. Garner, 3 F. and F., 681.

26—Com. v. Robinson, 146 Mass., 571.

ILLUSTRATIONS ON CHARACTER.

1. A is on trial for murder. His counsel offers evidence as to his general character. The question is, whether such evidence is admissible.

The evidence offered is legally relevant. Such evidence is competent in all criminal cases.[1]

2. A is on trial for receiving stolen property. He introduces evidence of his good character. The court charges the jury that "such evidence is important where the evidence to convict is doubtful, that it should be thrown into the scale in his favor; but where the evidence is strong, and his guilt is impressed on the minds of the jury, it is not of the slightest consequence." A is convicted. The question is, whether the court's instruction is ground for reversal.

The court's instruction is ground for reversal. It is not the law that evidence of character can be considered by the jury only in doubtful cases, and that it is not of the slightest consequence, where the evidence is strong, and the defendant's guilt is impressed on the minds of the jury.[2]

3. A is on trial for indecent assault. Several of his witnesses testify to his previous good character. The prosecution then offers evidence of his bad character to rebut this. The rebutting evidence consists of (1) the personal opinion of the witness; (2) particular facts; (3) rumors; and (4) general reputation. The question is, which, if any, of these four classes of character-evidence should be admitted.

The first three classes should be excluded, and the fourth admitted. Evidence of the personal opinion of the witness is too conjectural. Then again, there is the danger of prejudice on his part. Evidence of particular facts is also too conjectural, besides it complicates the case and tends to confuse the minds of the jurors. Evidence of rumors is too vague and uncertain and thus liable to mislead the jury. Evidence of general repu-

1—Com. v. Hardy, 2 Mass. (1807).

2—Com. v. Leonard, 140 Mass., 473; State v. Blue, 17 Utah, 175.

tation is strong circumstantial evidence of character, and is legally relevant.[3]

4. A sues B for libel. B offers evidence of A's bad reputation which the court excludes. A is given the verdict, the damages being assessed at £1500. The question is, whether the court's ruling, in excluding evidence of A's bad reputation, is prejudicial error.

In civil cases, character evidence is very generally inadmissible. There are, however, some exceptions. When the character of a party to the suit is one of the main facts in issue, evidence of his general reputation is admissible. A's character is a main fact in issue, as the injury to it is the gist of the action, and the amount of damages recoverable depends upon it. The court's ruling, therefore, is prejudicial error.[4]

5. A sues B for slandering her by imputing to her unchastity. In mitigation of damages B offers evidence of A's general reputation for being a quarrelsome person. The question is, whether such evidence is admissible.

The trait of A's character which is in issue is her chastity. Her general reputation relating to this is admissible, but the evidence offered should be excluded.[5]

6. A is on trial for grand larceny, after a former conviction for the same offense, the statute prescribing a greater penalty for a second offense. The prosecution offers evidence of the former conviction. A objects to this evidence on the ground that it tends to establish his bad character by proof of a specific act; and furthermore, because he has not opened the door for character-evidence by the prosecution, as he has not offered any evidence of his good character. The question is, whether A's objection should be sustained.

A's objection should not be sustained. The evidence objected to is evidence of a material fact in issue, and merely because it incidentally reflects upon A's character is not a sufficient reason for excluding it.[6]

3—R. v. Rowton, Leigh & Cave, 520.

4—Scott v. Sampson, 8 Q. B. D., 491; Proctor v. Houghtaling, 37 Mich., 41; Adams v. Smith, 58 Ill., 417.

5—Hosley v. Brooks, 20 Ill., 115.

6—Johnson v. People, 55 N. Y., 512.

7. A sues B, his employer, for damages for injuries caused to him by a fellow servant, C. After proving that C, at the time the injuries complained of were received, was old and physically weak, with sight and hearing seriously impaired, A, for the purpose of showing that B had not exercised reasonable care in employing such a fellow workman as C, for the class of work he was called upon to do, offers evidence that C "was generally reputed to be infirm in the senses of sight and hearing and in physical strength." The question is whether this character-evidence is admissible.

In the selection of his servants, a master is bound to exercise reasonable care, and if a fellow servant is incompetent to perform the work he is employed to do, the fact that he is generally reputed in the community to lack those qualities which are necessary for the proper performance of such work, is competent evidence to show that the master failed to exercise reasonable care in selecting him. Hence the evidence offered is legally relevant.[7]

8. A sues B for breach of promise to marry her and for seduction. In defense, B offers evidence of A's general reputation for unchastity after the promise and seduction. The question is, whether such evidence is admissible, either in mitigation of damages, or in bar of the action.

The evidence offered is inadmissible. A's degradation was the result of B's act. To permit B to give evidence of A's general reputation for unchastity, at a period *subsequent* to such act would be absurd.[8]

9. A sues B for seduction. The question is, whether A's previous general reputation for unchastity is admissible in evidence in mitigation of damages.

The general character of A for chastity *prior* to the seduction alleged, is involved in the issue, and evidence of it is legally relevant.[9]

10. A sues B for seduction. The question is, whether specific acts of unchastity of A with other men, prior to the alleged

7—Monahan v. Worcester, 150 Mass., 439.

8—Boynton v. Kellogg, 3 Mass., 188.

9—White v. Murtland, 71 Ill., 250.

seduction, such acts having been unknown to B at the time of the alleged seduction, are admissible in evidence in mitigation of damages.

As in the next preceding question, A's character for chastity is involved in the issue, and evidence of prior specific acts of immoral intercourse by her with other men is admissible.[10]

11. A sues B for malicious prosecution. The question is, whether B may give evidence of A's general bad reputation at the place where he resided at the time of his arrest, for honesty and fair dealing in business, to rebut evidence of want of probable cause, and also in mitigation of damages.

Since A's character is involved in both of these issues, evidence of his general bad reputation is admissible, and may be considered as to both of them.[11]

12. A sues B for malicious prosecution for larceny. The question is, whether A may introduce evidence of his own general reputation for honesty.

In civil actions, according to the general rule, evidence by the plaintiff, in the first instance, of his general good reputation is inadmissible. Such evidence, however, is admissible to rebut evidence of the plaintiff's general bad reputation. In actions for malicious prosecution of a *criminal* action, the plaintiff may, in the first instance, give evidence of his own good character. This class of actions, therefore, forms an exception to the general rule. Evidence of good reputation, however, is not admissible, in the first instance, to show that one is not guilty of a dishonorable or unlawful act which is not punishable as a crime.[12]

13. A sues B for slander, in imputing to her acts of unchastity. The question is, whether A, in the first instance, may introduce evidence of her good character.

Some cases hold that, in actions for slander and libel, the plaintiff's character is put in issue by the very nature of the

10—Love v. Masoner, 6 Baxt. (Tenn.), 24 (32 Am. Rep., 522); Berry v. Watkins, 7 C. & P. 308; 2 Greenl. Evid., Sec. 577.

11—Rosenkrans v. Barker, 115 Ill., 331.

12—McIntire v. Levering, 148 Mass., 546; Israel v. Brooks, 23 Ill., 526; Blizzard v. Hays, 46 Ind., 166.

proceeding, and therefore, the plaintiff may give, in the first instance, evidence of his good character.[13] The weight of authority, however, and perhaps the better reasoning, are to the contrary.[14] But, whenever the truth of a charge of *crime* is pleaded in justification, the plaintiff may give evidence, in the first instance, of his good character, to rebut the charge.[15]

14. A sues B to recover damages for the alleged willfully and maliciously setting fire to and causing to be burned certain stacks of wheat which belonged to A. The question is, whether B, in the first instance, may introduce evidence of his good character, as a bar to the action, or in mitigation of damages.

Since B's character is not in issue, evidence of his good character is not admissible for either purpose.[16]

15. A sues the B Ins. Co. on a policy of fire insurance. The company defends on the ground that A intentionally set fire to the buildings insured, to recover the insurance. The question is, whether A, in the first instance, may introduce evidence of his good character to rebut defendant's plea.

The question in this case is a close one. Some courts answer it in the negative, on the ground that this is a civil action, in which the question of plaintiff's character is not in issue.[17] Other courts hold the contrary, on the ground that, although the action is a civil one, the plaintiff's character is put in issue by the defendant imputing to him the commission of an act which constitutes a crime, and therefore has the right to rebut it by introducing evidence of his good character.[18] The weight of authority, and the better opinion favor the former view.

16. A sues B to recover money belonging to A, and which A alleges B has wrongfully converted. B pleads that the money has been stolen from him, and offers evidence of his general good character to rebut the presumption of such fraudulent conversion. The question is, whether such evidence is admissible.

13—Larned v. Buffinton, 3 Mass., 546; Adams v. Lawson, 17 Grat. (Va.), 250; Burnett v. Simpkins, 24 Ill., 265.

14—Fahey v. Crotty, 63 Mich., 383; Miles v. Vanhorn, 17 Ind., 245.

15—Downey v. Dillon, 52 Ind., 442.

16—Barton v. Thompson, 56 Ia., 571; Thayer v. Boyle, 30 Me., 475.

17—Am. Fire Ins. Co. v. Hazen, 110 Pa. St., 530-537.

18—Mosley v. Ins. Co., 55 Vt., 142-152.

B's character is not a fact in issue, and the evidence offered is inadmissible.[19]

17. A sues the E Fire Ins. Co. on a policy to recover for loss sustained by fire. The company defends on the ground that the policy is rendered void owing to the fraudulent concealment by A of the state of the property insured, in that, the goods insured were alleged in the policy to be in a "Frame House Filled in with Brick," whereas, they were in a frame house in which the walls were not filled in with brick. The court, against objection, allows A to introduce evidence of his general good character. The question is, whether the court's ruling is ground for a new trial.

Where a party is charged with a specific fraud, in a civil action, his character not being in issue, the evidence of fraud cannot be rebutted by evidence of general good character. The court's ruling, therefore, assuming that the verdict is in A's favor, is ground for a new trial.[20]

18. A sues B to recover damages for an assault and battery. The question is, whether B may introduce evidence of his good character as a peaceable citizen, either in bar of the action, or in mitigation of damages.

Assuming that B's plea is not *self-defense*, his character is not in issue; and such evidence is inadmissible for either purpose. However good his reputation may be as a peaceable citizen, it does not materially tend to show that he did not commit the offence charged, nor concern the question of damages. Where the plea is *self-defense*, however, the character of the defendant is material, and evidence pertaining to it is admissible, in bar of the action.[21]

19. A is on trial for bastardy. The question is, whether evidence is admissible to show (1) the general bad reputation for chastity of the complaining witness: (2) that she has had sexual intercourse with men other than the accused; and that (3)

19—Morris v. Hazlewood, 1 Bush (Ky.), 208.

20—Fowler v. Ætna Fire Ins. Co., 6 Cowen (N. Y.), 673 (16 Am. Dec., 460).

21—Fahey v. Crotty, 63 Mich., 382; Givens v. Bradley, 3 Bibb (Ky.), 192 (6 Am. Dec., 646).

since the birth of her child she has lived the life of a common prostitute.

In bastardy cases, the character of the complaining witness is not in issue. Hence, the evidence, in all three cases, is inadmissible.[22]

20. A sues B for assault and battery. A and her daughters testify in her behalf. B offers evidence that A and her daughters had, at various times and places, committed adultery, and that they had also been guilty of selling intoxicating liquors in violation of law. The question is, whether the evidence is admissible (1) in bar of the action, (2) in mitigation of the damages, or (3) to impeach the credibility of the witnesses.

The evidence is inadmissible for any of these purposes. Admitting the acts charged to have been done, they did not even tend to mitigate the conduct of B in assaulting A. Nor did such acts withdraw from A the protection of the law against physical violence.[23] For the purpose of impeaching the credibility of a witness, evidence of particular acts is inadmissible. The usual method is to introduce evidence of the general reputation of the witness; and such general reputation, according to the better view, should be confined to general reputation for truth and veracity.[24]

21. A sues B for criminal conversation. The question is, whether evidence is admissible (1) of the adulterous conduct of A, in bar of the action, or in mitigation of the damages; or,

22—Duffies v. The State, 7 Wis., 567; Rawles v. The State, 56 Ind., 433; Com. v. Churchill, 11 Metc., 538 (overruling Com. v. Murphy, 14 Mass., 387); The State v. Read, 45 Ia., 469.

23—"The fact that a man bears a bad character, or keeps company with persons of evil repute, furnishes no just provocation or palliation for doing violence to his person. He may forfeit the good opinion of his fellow men, and become an object of pity or contempt, by reason of his evil habits and associations, and want of moral worth; but there is no principle of law or ethics on which, for such a cause, immunity is to be granted to those who inflict injuries upon another, or full indemnity to be denied to a party for a violation of the sanctity of his person." Waterman on Trespass, vol. 2, § 272, p. 244.

24—Dimick v. Downs, 82 Ill., 570; Frye v. Bank of Ill., 11 Ill., 373; Gifford v. People, 87 Ill., 210; Com. v. Grose, 99 Mass. 424.

(2) of the adulterous conduct of A's wife, in bar of the action, or in mitigation of the damages.

The evidence, in both cases, is admissible for the purpose of mitigating the damages; but, in neither case is it admissible in bar of the action. Evidence is also admissible of the condition in life and pecuniary abilty of both A and B.[25]

22. A sues the C. Ry. Co. to recover damages for the death of her husband, B, who lost his life while coupling cars. There were no eye-witnesses of the accident. A offers evidence (1) of B's general reputation for being a careful, prudent and sober man; and also, (2) of the usual mode of coupling and uncoupling cars at the switch where B was killed. The court, against objection, admits the evidence in both cases, and A recovers a verdict. The question is, whether the court's ruling in either case is ground for reversal.

As regards the evidence of B's general reputation for being a careful, prudent and sober man, many courts hold, including those of Illinois, in view of the fact that there were no eye-witnesses, that such evidence is admissible. All courts, however, hold that such evidence is inadmissible, provided evidence of eye-witnesses of the accident is available. It seems therefore, that the admissibility of the evidence in the former case is based upon necessity rather than upon principle.

As regards the evidence of the usual mode of coupling and uncoupling cars at the switch where B was killed, the court's ruling is ground for reversal. What others did, or were in the habit of doing, does not tend to prove the issue as to due care on the part of B.[26]

25—Rea v. Tucker, 51 Ill., 110; Grable v. Margrave, 4 Ill., 372, 2 Greenl. Evid., sec. 56.

26—C. R. I. & P. Ry. Co. v. Clark, 108 Ill., 113; St. Ry. Co. v. Robbins, 43 Kan., 145.

ILLUSTRATIONS ON CONFESSIONS.

1. A, who is on trial for the murder of X, offers in evidence a confession made by B on his deathbed, when in extremis, and with all hope of living gone, that he (B) alone was guilty of X's murder. The question is, whether B's confession is admissible.

B's confession is not admissible, either as a confession, as a dying declaration, or, as a declaration against interest by a person since deceased.

2. A is on trial for the murder of B. The prosecution offers in evidence a confession by A, made to the chaplain of the prison, and induced by an exhortation of the chaplain to confess his sins "to God," and to confess to man "to repair any injury done to the laws of his country." The question is, whether the confession is a voluntary one.

As the chaplain was not a person in authority, the confession is voluntary.[2]

3. A is on trial for larceny. While in jail, he was induced, by the jailor's promise to allow him to see his wife, to make a statement as to the location of the stolen goods. The question is, whether this statement is admissible in evidence against him.

The statement is admissible for several reasons. It was not induced by a person in authority. The inducement was immaterial. Moreover, the statement is not a confession of guilt, but merely a criminating statement of fact.[3]

4. A, who is on trial for receiving stolen goods, made an involuntary confession in which she disclosed the location of the goods. The question is, whether evidence that the goods were found in her lodgings, concealed between the sackings of her bed, and that they were so found as a result of her involuntary confession, is admissible against her.

As the reason for excluding the involuntary confession, viz., unreliability owing to the inducement made, does not apply to the evidence offered, it is admissible as to both facts.[4]

1—Davis v. Com., 95 Ky., 19 (23 S. W. R., 585).

2—R. v. Gilham, 1 Moo. C. C., 186.

3—R. v. Lloyd, 6 C. and P., 393.

4—The King v. Jane Warickshall, Leach (4th edit.), 263.

5. A is on trial for administering poison to his wife with intent to murder her. The question is, whether the words, "he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him," made by the constable in A's presence, amount either to a promise or threat, sufficient to render a confession by A as a result, involuntary.

The purport of the words used by the constable was not such as to amount either to a promise or threat, sufficient to make A's confession involuntary.[5] If, however, the constable had said to A, "you had better tell the truth," or "you had better tell about it," A's confession would have been involuntary.[6]

6. A is on trial for murdering his wife. While in jail, he was permitted by the sheriff, at his own request, to interview a girl who was implicated with him, and who was in another cell of the jail. The conversation between A and the girl was overheard by two of the sheriff's deputies, who were secretly stationed so as to hear it. The question is, whether statements by A to the girl, amounting to a confession of guilt, and overheard by the deputies are admissible in evidence by them.

The artifice resorted to by the officers was not calculated to produce an untrue confession, and therefore it is voluntary, and the statements by A admissible.[7]

7. A is on trial for murder. The magistrate informed A that, if he would make a confession of guilt, he would try to obtain a pardon for him. Subsequently the magistrate was informed by the secretary of state that no pardon would be granted; and, after A learned of this, he confessed his guilt. The question is, whether the confession is voluntary.

As the hope of reward was withdrawn before the confession was made, the confession is voluntary and admissible.[8]

8. A, who is on trial for arson, made a confession of guilt. The evidence is conflicting as to whether the confession is voluntary or not, but the court admits it. The question is, whether the court may instruct the jury that they should ex-

5—R. v. Baldry, 2 Den. C. C. R., 430.

6—Com. v. Nott, 135 Mass., 269.

7—Com. v. Goodwin, 186 Pa., 218.

8—R. v. Clewes, 4 C. and P., 221.

clude the confession, if, upon the whole evidence they are satisfied that it was not the voluntary act of the accused.

Not only may the court so instruct the jury, but to do so is in harmony with the better practice.[9]

9. A, a colored boy, about fourteen years of age, is on trial for murder. Two officers, without a warrant, arrested him on suspicion, and, after searching him, stripped him of his clothing, and put him into a cell at the police station. Late at night they took him from the cell and questioned him for two hours, without warning him of his right not to answer, or offering him an opportunity to consult friends or counsel. During this interview he confessed his guilt. The question is, whether the proceedings of the officers, under such circumstances, rendered the confession involuntary.

In the absence of threats or promises, the confession is admissible.[10]

10. A, a girl, fourteen years of age, is on trial for burning a dwelling house. While in the custody of officers, and in response to questions by them, she confessed her guilt. The question is, whether the fact that she was under arrest when she made the confession, or, that she made it in response to questions by the officers, or, from fear induced by some cause other than threats or promises made to her, renders the confession involuntary and inadmissible.

None of the facts stated is sufficient to render the confession involuntary.[11]

11. A, B and C were indicted for the murder of X. A confessed to M, on the promise of M that he would try to get him admitted as a witness for the prosecution. M applied to the attorney general, who thereupon accepted A as a witness for the state, and promised complete protection for A, provided he made a full disclosure, upon the trial of his accomplices. A then made a full written confession. Before the time set for C's trial, he committed suicide in his cell. When B was tried,

9—Com. v. Preece, 140 Mass., 276; People v. Howes, 81 Mich., 396.

10—Com. v. Cuffee, 108 Mass., 305.

11—Com. v. Smith, 119 Mass., 305.

A absolutely refused to keep his promise to testify against him, and make a full disclosure; but B was convicted. A is now upon trial, and the question is, whether his written confessions are admissible against him.

A's written confessions are admissible against him. By his refusal to testify, and make a full disclosure as he agreed to do, he forfeited all claim to protection by the government. This protection he had solicited, and he was free to accept it upon the terms offered, or stand upon his defence. Both in England and in this country, the law upon this point is well settled.[12]

12. A was on trial for breaking and entering a shop with intent to steal. The prosecution offered in evidence a confession by A, which A objected to on the ground that it was made in consequence of offers of favor made to him by the officer who arrested him. The officer testified that he made no offers of favor to A, nor caused any to be made. A then offered to prove, by five witnesses, the truth of his claim, but the court refused to hear any of these witnesses, and the confession was admitted, and A convicted. The question is, whether the court erred in refusing to hear A's witnesses before admitting the confession offered.

The court erred in refusing to hear A's witnesses. The admissibility of the confession was a preliminary question of fact for the court to pass upon, but it was its duty to determine it upon hearing competent evidence upon it which was tendered by either party.[13]

13. A is on trial for murder. The prosecution offers in evidence a confession by A to which A objects on the ground that it is not a voluntary one. The question is, upon whom is the burden of proof.

The burden of proof, according to the better view, is upon the prosecution to show that the confession is voluntary.[14] Some courts, including those of Massachusetts, put the burden upon the defendant, to prove the contrary.[15] In England, the better view obtains.[16]

12—Com. v. Knapp, 10 Pick., 477.

13—Com. v. Culver, 126 Mass., 464.

14—Roesel v. State, 62 N. J. L., 216.

15—Com. v. Knapp, 10 Pick., 477.

16—R. v. Thompson, 2 Q. B. D., 12.

14. A is on trial for adultery. While in the custody of the officer who arrested him, he solicited his advice as to the advisability of pleading guilty, and the officer replied that, he "did not wish to advise him one way or the other for fear it might not suit him"; and then added that, "as a general thing it was better for a man who was guilty to plead guilty, for he got a lighter sentence." A thereupon made a confession to the officer of his guilt. The question is, whether the confession is admissible against A.

As the hope of a lighter sentence was expressly held out to A, as a result of his pleading guilty, his confession is involuntary. The fact that the officer's remarks related to pleading guilty when A was put upon trial, and not to the making of a confession *in pais*, is immaterial.[17] "Saying to the prisoner that it will be worse for him if he does not confess, or that it will be better for him if he does, is sufficient to exclude the confession, according to constant experience."[18]

15. A, a boy sixteen years of age, is on trial for burning a barn. Before his arrest, he went to the office of the Fire Marshal, in response to a request to do so, and was interviewed by that official in regard to his connection with the fire. Among the questions and answers were the following: Boy: "Do you think that I set the fire?" Marshal: "Yes." Boy: "Why?" Marshal: "No matter." Boy: "I had nothing to do with the Chaffee fire." Marshal: "Go on and tell me about the Germain fire." Boy: "What will they do with me, will they send me away?" No reply. Marshal: "How many matches did you use?" Boy: "One." Marshal: "Where did you get it?" Boy: "At Germain's kitchen." Marshal: "Now I want to call in some witnesses, and this evidence may be used against you." The officer then called in a stenographer, who took down on paper the boy's confession, which purported to be made of his own free will without hope of favor and after having been duly warned, and which was wholly dictated by the official and acquiesced in from time to time by the boy, and which was finally subscribed and sworn to by the boy and signed by two witnesses. The question is, whether this written confession is admissible against A.

17—Com. v. Curtis, 97 Mass., 574. 18—2 East P. C., 659; 1 Greenl. Ev., sec. 219.

As every word of the confession was put into A's mouth, by one in whose power he probably thought himself to be, the manner in which it was prepared is deserving of criticism; yet, as it purports on its face to have been made of A's own free will, without hope of favor, it is not, as a matter of law, inadmissible.[19]

16. A is on trial for the murder of her child. Her mistress held out an inducement to her, as a result of which she made a confession of her guilt. The question is, whether A's confession is admissible against her.

The confession is admissible because A's mistress was not a person in authority.[20]

17. A is on trial for burglary. He made an involuntary confession to a policeman, part of which was that he threw a lantern into a certain pond. As a result of the confession, the lantern was subsequently found in the pond; and the question is, whether the fact of the finding it in the pond, and also the fact that such finding was a result of A's statement that he threw the lantern in the pond, are admissible in evidence against him.

Both of these facts are admissible, notwithstanding the fact that A's confession was involuntary and for this reason inadmissible.[21]

18. A is on trial for murder. While in the custody of a police officer, the officer, for the purpose of inducing A to make a confession, falsely assured him that an alleged accomplice had "blowed upon him," and would testify to his guilt. A thereupon made a confession to the officer. The question is, whether the confession is admissible against A.

As the deception used by the officer to induce the confession did not amount to a threat of punishment or hope of reward, the confession is admissible.[22]

19. A is on trial for breaking and entering shops and stealing shoe stock therein. While in a state of intoxication he made a confession of his guilt to B. The court instructs the jury, "that the evidence of intoxication was only to be considered by

19—Com. v. Bond, 170 Mass., 41.
20—R. v. Moore, 2 Den. C. C., 522.
21—R. v. Gould, 9 C. and P., 364.
22—Price v. State of Ohio, 18 Ohio St., 419.

the jury, in determining what weight was to be given to the confession of the defendant as evidence; that if they found he was so much under the influence of liquor as not to understand what he was confessing, they ought to disregard the confession as evidence altogether; and that the burden was upon the government to show the confession was voluntary." The court also rejects evidence by A's witnesses to show that the confession was not true; that the facts, as stated in the confession, did not occur. The question is, whether the court's instructions to the jury, and its ruling on the question of evidence, are correct.

The instructions are wholly correct;[23] but the ruling on the question of evidence is prejudicial error. A's confession is not conclusive. He has the right to show by competent evidence that the confession is false.[24]

20. A is on trial for murder. The question is, whether a confession by him, made before his arrest, and, while testifying under oath as a witness at the coroner's inquest, is admissible against him.

A's confession is not inadmissible merely because it was made under oath; nor because the proceeding in which it was given had reference to the same subject matter as the proceeding in which it is now offered in evidence. If, however, he was compelled to give it, after refusing to do so on the ground that his answer would tend to criminate him, and the circumstances justified his refusal, the confession is inadmissible.[25]

21. A seeks a divorce from his wife B, on the ground of her adultery with C. The only evidence A offers in support of his case is a certain confession of guilt made by B. The question is, whether B's confession is admissible against the co-respondent C, and, if not, whether the suit against B must necessarily fail.

B's confession is admissible only against herself.[26] In criminal cases, owing to a technical rule of the criminal law, when two persons are tried jointly for an offence which requires

23—Com. v. Howe, 75 Mass., 110.

24—R. v. Spilsbury, 7 C. and P., 187.

25—R. v. Paul, 25 Q. B. D., 202; State v. Gilman, 51 Me., 209; State v. Clifford, 86 Ia., 553; Teachout v. People, 41 N. Y., 7.

26—Robinson v. Robinson, 1 Sw. & Tr., 362.

the joint act of both to commit, and one is acquitted, the other must be acquitted also.[27] Upon principle, however, this technical rule is wrong.[28] In civil cases it is not applied;[29] and, in a few states it has been repudiated in criminal cases.[30] As A's suit against B is a civil one, the fact of no evidence against the co-respondent, C, is not a sufficient reason to cause it to fail.

22. A and B are jointly indicted for the murder of C. A makes a voluntary confession in the presence of B, under such circumstances that B would naturally contradict it if he does not assent. The question is, whether A's confession is admissible against B.

B's tacit acquiescence, under the circumstances stated, makes the confession his also, and it is admissible in evidence against both.[31]

27—State v. Rinehart, 106 N. C., 787.

28—Harvard Law Review, vol. 16, p. 142.

29—Robinson v. Robinson, *supra.*

30—Alonzo v. State, 15 Tex. App., 378.

31—Sparf and Hansen v. United States, 156 U. S., 51.

ILLUSTRATIONS ON HEARSAY EVIDENCE.

1. A, a slave woman, petitions for her freedom, on the ground that the ancestor from whom she claims is free. The question is, whether the deposition of B, to a fact which he had heard his mother say she had frequently heard from her father, and the deposition of C, that he had heard A's ancestor say that A's place of birth and residence were at X, are admissible in evidence, on A's behalf.

The depositions offered are mere hearsay and inadmissible. Hearsay evidence is incompetent to establish any specific fact, which is in its nature susceptible of being proved by witnesses who speak from their own knowledge.[1]

2. A is on trial for murder. He offers in evidence statements of other persons that they killed the deceased. The question is, whether such statements are admissible.

The statements offered are mere hearsay and inadmissible; and, had they been made under oath, the rule would exclude them.[2]

3. A is on trial for robbing B. The question is, whether statements by B to third parties, descriptive of the person who robbed him, are admissible on A's behalf, to show that he is not the party thus described.

These statements are mere hearsay, and for this reason inadmissible.[3]

4. A sues the town of X for damages for injuries caused to her owing to a defective sidewalk. The question is, whether statements relating to the question in issue, made to A at the time of the accident by a party who accompanied her, are admissible on A's behalf.

The statements in question are mere hearsay, and legally irrelevant.[4]

5. In an action to determine who is the owner of certain

1—Mima Queen v. Hepburn, 11 U. S., 290.
2—State v. Haynes, 71 N. C., 79.
3—People v. McCrea, 32 Cal., 98.
4—Armstrong v. The Town of Ackley, 71 Ia., 76.

real estate, the question is, whether certain letters addressed to a testator, since deceased, indicating that the writers thought him sane, but which were not acted upon by him, are admissible to prove his sanity, where such fact is material to the issue.

The statements contained in the letters are mere hearsay, and the letters are inadmissible. If, however, the letters had been acted upon by the testator, that fact would have rendered them legally relevant.[5]

6. A's administrator, B, sues C, in assumpsit, for money loaned by A to C. The court, against objection, allows A's daughter, H, to testify that, about a week before her father's death, she heard him tell her brother S that C owed him two hundred and twenty dollars for money which he had loaned C. The question is, whether the court's ruling is prejudicial error, judgment being rendered in A's favor.

The evidence objected to is pure hearsay, and the court's ruling is prejudicial error.[6]

7. A is on trial for unlawfully running a faro-bank. The court, against objection, permits a witness on behalf of the state to testify that he had understood "from others, that the defendant" and another "were the owners of the faro-bank," and that he knew its ownership only "by hearsay." A is convicted. The question is, whether the court's ruling is prejudicial error.

The evidence in question is only hearsay, and for this reason should have been excluded. The court's ruling is prejudicial error.[7]

8. A sues B in replevin. B calls the assessor, as a witness on his behalf, and the court, against objection, allows him to testify that he assessed the property in issue to C. B recovers a verdict. The question is, whether the court's ruling is prejudicial error.

Evidence that property is assessed to a certain person is not

5—Wright v. Doe de Tatham, 7 Adol. & Ell., 313.

6—Treadway v. Treadway, 5 Ill. App., 478.

7—Schooler v. State, 57 Ind., 127.

competent to prove his ownership thereof. The court's ruling is prejudicial error.[8]

9. A sues B to recover the value of certain property unlawfully sold under an execution. To prove the value of the property sold, A offers in evidence the appraisement attached to the sheriff's execution. The court, against objection, allows the appraisement to be read in evidence, and A recovers a judgment for this amount. The question is, whether the court's ruling is prejudicial error.

The appraisement is mere hearsay, and not competent evidence to prove the value of the property. The court's ruling is prejudicial error.[9]

10. A files a bill against B to redeem. The question is, whether a statement by A to a third party, that she (A) had made an agreement with B, after he entered to foreclose, that he should occupy the premises as her tenant, is legally relevant to prove (1) that the alleged agreement was made; or, (2) to corroborate A's testimony; or, (3) to rebut a statement made by B's counsel in his opening address, to the effect that A's story of the agreement is a fabrication.

The statement was made after the alleged agreement, and was not a part of it. It is, therefore, mere hearsay, and not legally relevant for any of the three purposes stated.[10]

11. A seeks to probate B's will. C contests it on the ground of B's mental incapacity. The question is, whether the following testimony is legally relevant: (1) Statements by one of the legatees, prior to B's death, that B was crazy; (2) The statement of a party, who, shortly before B's death was sent for to draft his will and who declined to go, that his reason for declining was that he did not consider B capable of making a will; and, (3) Acts or statements of B tending rather to show that he was irritable than incompetent.

All of these three classes of testimony are mere hearsay, and legally irrelevant.[11]

8—Adams & Co. v. Hickox, 55 Ia., 632.

9—Flannigan v. Althouse, Wheeler & Co., 56 Ia., 513.

10—Wallace v. Story, 139 Mass., 115.

11—*In re* Estate of Lefevre, 102 Mich., 568.

12. A sues B to recover possession of a quantity of liquors which he had purchased from C. B had levied upon the property under, and by virtue of, two attachments against C, under which he justified, claiming that the sale by C to A was fraudulent and void as to C's creditors. To show fraud on the part of C, B offers in evidence, against objection, some fifteen attachments against him, for a large amount, on the ground of frauds alleged to have been committed by him, and the court admits the evidence. B obtains judgment. The question is, whether the court's ruling is prejudicial error.

The fifteen attachments are pure hearsay, and should have been excluded. The court's ruling is prejudicial error. A conclusion reached by a judicial officer upon *ex parte* affidavits, to the effect that they contain sufficient evidence to prove an indebtedness from one party to another, and the perpetration of frauds on the part of the debtor in incurring it, is not competent evidence in an action between third parties to establish either the indebtedness or the frauds.[12]

12—Bookman v. Stegman, 105 N. Y., 621.

ILLUSTRATIONS ON APPARENT EXCEPTIONS TO THE RULE AGAINST HEARSAY.

1. A sues B for malicious prosecution. B, to show that he had probable cause for prosecuting A, in the former action, and to rebut malice, offers evidence that C and D communicated to E, with a request that E tell B, the fact that C and D saw A do the criminal act of which he was accused by B, and that such information was communicated to B, before the complaint against A was made. This evidence is objected to as mere hearsay, and the court sustains the objection. The question is, whether the court's ruling is prejudicial error, judgment being entered for A.

The evidence offered by B is legally relevant; and the court's ruling is prejudicial error. The statements by C and D to E are not offered as testimonial evidence, but merely to show the information upon which B acted in accusing A.[1]

2. A is on trial for stealing horses. To show A's knowledge of the brand on the horses stolen, evidence is offered by the state of a statement made in A's presence, prior to the larceny, concerning the matter. This evidence is objected to as mere hearsay; but the court overrules the objection. A is convicted. The question is, whether the court's ruling is prejudicial error.

As the statement was made in A's presence, it is admissible in evidence against him, and the court's ruling is correct.[2]

3. A sues the B church society for his salary as a clergyman. To prove his contract, he is permitted, against objection, to put in evidence part of a sermon preached by him, at the beginning of the alleged term, to the usual congregation of the society, in which he spoke of their meeting "at the beginning of a year to us of united Christian labor." The question is, whether the court's ruling, judgment being entered for A, is prejudicial error.

1—Bacon v. Towne, 58 Mass., 217; Gallaway v. Burr, 32 Mich., 331.

2—Shackelford v. State, 53 S. W. R. (Tex.), 884.

The court's ruling is prejudicial error. The extract from the sermon is merely a declaration of a fact in A's favor, not communicated to the defendants in their corporate capacity, and made under such circumstances as not to admit of contradiction. That the congregation heard it and did not deny it, had no tendency to prove that the defendants assented to it.[3]

4. A is on trial for committing an abortion on B and thereby causing her death. The state proves by C, through an interpreter, that, on a certain night, C went with B to A's house; that when they had entered the house, a conversation in the French and English languages took place between A and B, in the presence of A's wife, who acted as interpreter for them, as she could converse in both French and English, while A could converse only in English and B only in French. For the purpose of showing that B went to A's house to have an abortion performed on her, and that A agreed to perform the abortion, the court, against objection, allows C, who understands only French, to state in detail the conversation between A and B. A is convicted. The question is, whether the court's ruling is prejudicial error.

The court's ruling is correct. What was said in A's presence, and not contradicted by him, is admissible in evidence against him. The fact that the conversation was carried on through an interpreter may affect the *weight* of the evidence, but not its *competency*.[4]

5. A sues B in replevin to recover an omnibus, which had been sold on execution to B while in the possession of C under an oral agreement between him and A for the purchase of it. A offers to prove by D, who was present when the agreement between A and C was made, the terms of the agreement. B objects to this evidence as hearsay, as he was not present when the agreement was made. The question is, whether D's evidence is legally relevant.

D's evidence is not hearsay, but evidence of a fact. It is not offered as testimonial evidence. The agreement depended upon what the parties to it *said,* and not upon the truth or

3—Johnson v. Trinity Church Society, 93 Mass., 123.

4—Com. v. Vose, 157 Mass., 393.

falsity of what they said. They might have agreed that certain things were true for the purposes of their contract, though both knew at the time that they were false. D's evidence is original evidence, and legally relevant as such.[5]

6. A sues B for breach of a contract to purchase corn. To prove the market value of the corn, at the time of the alleged breach, evidence is offered by A, against objection, of market quotations contained in a morning paper, which quotations were given as the prices of the day before when the alleged breach occurred. The question is, whether the evidence offered is legally relevant.

This evidence, though based upon hearsay, is, in a sense, original evidence, and legally relevant. Courts take judicial notice of the usual manner in which commercial business is carried on; and that, in the purchase of grain or other commodities, the purchaser, as a rule, is governed by the latest available quotations.[6]

7. A sues B for the value of a painting which B intentionally destroyed. B defends on the ground that the painting was a libel on his sister and her husband. To prove this, he offers in evidence declarations of spectators, made while looking at the painting when it was on exhibition. The question is, whether this evidence is legally relevant.

This evidence may well be treated as original evidence. The evidentiary fact is, *what was said*, and not its truth or falsity. It is a verbal act, and legally relevant, whether it be treated as original evidence, or, as an exception to the rule against hearsay.[7]

8. A sues the city of L, for damages for personal injuries caused by a shade tree in the street falling on him. To show that the city was charged with notice of the dangerous condition of the tree, A offers in evidence, against objection, declarations of such dangerous condition, by persons passing along the street. The question is, whether such statements are legally relevant.

5—Blanchard v. Child, 73 Mass., 155.

6—Nash v. Classen, 163 Ill., 409; Sisson v. Cleve. & Tol. Ry. Co., 14 Mich., 489.

7—Du Bost v. Beresford, 2 Camp., 511.

The answer to question 7 is applicable to this one.[8]

9. A sues the D Street Ry. Co. for damages for personal injuries received while riding in a street-car. The question is, whether evidence of the general bad reputation of one of the horses attached to the car, among the drivers and other employes of the company, for being unsafe and unreliable, is legally relevant to show negligence on the part of the company in providing such an animal, and using it after the company knew, or should have known, the unfitness of the horse for such work.

General reputation, though based upon hearsay, is itself a fact. Evidence of the general bad reputation of the horse is original evidence, and legally relevant.[9]

10. A is on trial for murdering B by drowning her. In his defence, A claims that B committed suicide. To prove this, he offers evidence by C, that, the day before B's death, B, who was five months pregnant with child, came to C and told her that she was going to drown herself. This evidence is objected to, and the court excludes it. A is convicted. The question is, whether the court's ruling is prejudicial error.

The court's ruling is prejudicial error. B's state of mind and intention, at the time she made the statement, are evidentiary facts material to the fact in issue; and her statement, when introduced in evidence solely to show such state of mind and intention, is legally relevant. Such statement is a verbal act, constituting original circumstantial evidence, from which such state of mind or intention may be inferred in the same manner as from her appearance, or general behavior, at that time.[10]

11. A sues the M Life Ins. Co. to recover the amount of the policy on B's life. The company defends on the ground that B is not dead, and claims that the body found at a certain place, and which A alleges is B's, is not B's but C's. To show that the body is C's, the defendants offer in evidence, against objection, two letters written by C at W, about two weeks before

8—Chase v. Lowell, 151 Mass., 422.

9—Wormsdorf v. Detroit Ry. Co., 75 Mich., 472.

10—Com. v. Trefethen, 157 Mass., 180.

the body was found at L, containing statements of C's intention to go, within a few days, with B, from W to L. The decision of the case hinges upon the answer to the question, whose body was found at L, B's or C's. The court excludes the letters, and A recovers a verdict. The question is, whether the court's ruling is prejudicial error.

The court's ruling is prejudicial error. C's intention, at the time the letters were written by him, is a material evidentiary fact; and whenever a person's intention is of itself a material fact in a chain of circumstances legally relevant to the fact in issue, contemporaneous oral or written declarations of the party are admissible to prove such intention.[11]

12. A, and her paramour B, are on trial for the murder of A's husband. In their defence, they claim that the deceased committed suicide. To prove this, they offer in evidence, against objection, declarations by A's husband, made at different times within a year prior to his death, and prior to his last sickness, that he intended to take his own life. The question is, whether such declarations are legally relevant.

According to the rule which obtains in Illinois, the declarations are not legally relevant. This rule requires that the declarations, to be admissible, must be contemporaneous with the act done. According to the better view, however, such declarations are legally relevant though not contemporaneous with the act done, provided they are contemporaneous with the intention, and the intention is a material evidentiary fact.[12]

13. A seeks to probate B's will. C contests it on the ground of B's mental incapacity when the will was made; and, to prove it, he offers in evidence, against objection, certain declarations made by B *after* the will was executed. The question is, whether the declarations offered are legally relevant.

Assuming that B's state of mind, at the time the declarations were made, is a fact not too remote to the fact in issue to be

11—Mutual Life Ins. Co. v. Hillmon, 145 U. S., 285; *contra*, Siebert v. The People, 143 Ill., 571; Chic. Ry. Co. v. Chancellor, 165 Ill., 438.

12—Siebert v. The People, 143 Ill., 571; Chic. Ry. Co. v. Chancellor, 165 Ill., 438; *contra*, Com. v. Trefethen, 157 Mass., 180; Mutual Life Ins. Co. v. Hillmon, 145 U. S., 285.

legally relevant, the contemporaneous declarations by B are also legally relevant.[13]

14. A is on trial for the murder of his wife's father. His plea is insanity. His wife, in testifying on his behalf, offers evidence, against objection, that, a few days before the homicide was committed, she told A that her father had stolen his potatoes; and that, upon several occasions before her marriage, her father had criminally assaulted and forced her against her will; and that, since her marriage, and within a very short time, he had come to their house, in A's absence, and similarly assaulted her, and threatened to kill her if she told anyone. A's counsel explains that the purpose of the evidence is not to prove the *truth* of the statements, but to show that it operated upon A's mind to such an extent as to render him insane when the homicide was committed, as he would show that A believed it. The court excludes this evidence, and A is convicted. The question is, whether the court's ruling is prejudicial error.

The court's ruling is prejudicial error. The question in issue is A's sanity at the time the homicide was committed. The purpose of the evidence offered is to show that the information furnished to A by his wife so operated upon his mind as to render him insane when the act was committed. For this purpose, the evidence is material to the fact in issue, and therefore, is legally relevant.[14]

13—Waterman v. Whitney, 11 N. Y., 157; Herster v. Herster, 122 Pa. St., 239; Lane v. Moore, 151 Mass., 87; Burns v. Mill, 121 N. C., 336.

14—People v. Wood, 126 N. Y., 249.

ILLUSTRATIONS ON REPORTED TESTIMONY, AND OTHER DECLARATIONS UNDER OATH.

1. A sues B in ejectment. A claims as C's heir-at-law, and B claims under C's will. B, who desires to put C's will in evidence, seeks to establish its due execution by means of evidence given at a former trial by W, one of the subscribing witnesses to the will, and who is now dead. The former trial was between the same parties, and related to the same subject matter. A objects to this testimony, on the ground that one of the subscribing witnesses to the will is living, and within the jurisdiction of the court. The question is, whether the testimony given by D, at the former trial, is admissible.

Since the parties to the two trials, and the subject matter of each, are the same, D's testimony given at the former trial is admissible.[1]

2. A sues B in ejectment. A seeks to introduce in evidence the testimony of M, given by him in a former action, in which A's son sued B's father, concerning the same subject matter. M is now dead. In the former action, A's son believed his father dead, and claimed as his heir. B's father is now dead, and, in this action, B claims as his father's heir. The question is, whether the testimony given by M, at the former trial, is admissible.

M's testimony, at the former trial, is inadmissible. The plaintiffs in the two actions are related by blood, but there is no privity of interest between them as regards the subject matter of the actions, since A did not derive his title to it from his son.[2]

3. A sues B in assumpsit on a verbal agreement. At a former trial, between the same parties, and concerning the same subject matter, C testified in the case. He is now called by B to testify, but states that he has no recollection of the matter he testified to at the former trial, but knows that whatever he stated at that time was certainly true. The question is, whether the testimony given by C at the former trial is admissible.

1—Wright v. Doe de Tatham, 1 Adol. & Ell., 3-19.

2—Morgan v. Nicholl, L. R., 2 C. P., 117.

The testimony given by C at the former trial is inadmissible. Mere loss of memory is not sufficient to render it admissible.[3] The testimony may, however, be used by C to refresh his memory.[4]

4. A sues B for damages for raising the height of a certain dam, as a result of which A's land was overflowed. A derived his title from C, and B derived his title from D. B seeks to introduce in evidence testimony given by S at a former trial between C and D, concerning the same subject, matter. S is now dead. The question is, whether S's testimony is admissible.

S's testimony is admissible. The parties to the two actions are substantially the same.[5]

5. A, against whom criminal proceedings were instituted for perjury, alleged to have been committed by him in a case to which he was a party, and which was tried before a justice of the peace, sues B for malicious prosecution. The justice of the peace is called as a witness for A, and testifies that he cannot recollect all of A's testimony, but has a memorandum of it, taken when the evidence was given, and that the statements contained therein are correct. The question is, whether the memorandum is admissible.

The memorandum is legally relevant. It is a record of *past* recollection which is verified by the witness under oath.[6]

6. A sues B on a promissory note. The question is, whether the court stenographer's minutes, properly verified, of the testimony given upon a former trial, between the same parties and relating to the same subject matter, by a witness who has since left the state, are legally relevant.

According to the modern rule, in many of the states, including Michigan, such evidence is held to be legally relevant. As such evidence constitutes a record of *past* recollection, when its

3—Drayton v. Wells, 1 N. & Mc. (S. C.), 409; Reed v. Orton, 105 Pa. St., 294-299; Robinson v. Gilman, 43 N. H., 295.

4—Rothrock v. Gallaher, 91 Pa. St., 108; Stone v. Ins. Co., 71 Mich., 81; Ruch v. Rock Island, 97 U. S., 693.

5—Yale. v. Comstock, 112 Mass., 267.

6—Spalding v. Lowe, 56 Mich., 366.

truth is sworn to by the stenographer, upon principle it should be held admissible.[7]

7. A sues the B Ry. Co. for damages for injuries received by her owing to the defendant's negligence. The case was tried previously in a justice of the peace court. A, who is now a witness in her own behalf, and who heard C's evidence upon the former trial, is asked by her counsel to state the substance of C's evidence upon that occasion. C is now dead. A replies that she can give the substance of *part* of it, but not of the whole of it. The question is, whether A should be allowed to give the substance of only a part of C's evidence.

A witness who is called to give the testimony of a witness upon a former trial must be able to state the substance of the *whole* of such testimony, in so far as it is material to the present question in issue.[8] In a few states, including Massachusetts, the substance of the language is essential.[9]

8. A is on trial for incest, in having improper relations with his daughter B. At a former trial B testified against A. There is evidence which tends to show that B has been taken out of the state by A to deprive the prosecution of her testimony. The question is, whether B's testimony, given by her at the former trial, is now admisible.

When a witness is kept away by the connivance of the adverse party, the testimony of such witness, given at a former trial, between the same parties and relating to the same subject matter is, according to the general rule, legally relevant.[10] In a few cases, however, such evidence has been improperly excluded.[11]

9. A sues B to recover the price of two oxen. In a former trial between the same parties, concerning the same transaction, A testified in German, and his evidence was interpreted to the jury by C, who is living and within the jurisdiction of the court. D, who was present at the former trial, and heard A's evidence interpreted to the jury in English, but who does not understand

7—Stewart v. First Nat. Bank, 43 Mich., 257.

8—Fell v. The B. C. R. & M. Ry. Co., 43 Ia., 177.

9—Com. v. Richards, 35 Mass., 434; Wilbur v. Selwin, 6 Cowen, 162.

10—Cook v. Stout, 47 Ill., 530; Howard v. Patrick, 38 Mich., 795; Radcliffe v. Barton, 161 Mass., 327.

11—Bergen v. People, 17 Ill., 425.

German, is now called upon to testify to A's evidence given at the former trial. The question is, whether such evidence is legally relevant.

The evidence offered is inadmissible. The interpreter at the former trial was not A's agent, but a witness appointed by the court. Testimony given by an interpreter, on a former trial, cannot be given by one who heard the evidence, unless the interpreter is dead, or insane, or out of the jurisdiction of the court, or sick and unable to testify, or, having been summoned, is kept away by the adverse party.[12]

10. A is on trial for murder. The prosecution offers in evidence, against objection, the substance of the testimony given by B against A, in a former action against him for the same offence. B is now dead. The court allows the evidence, and A is convicted. The question is, whether the court's ruling is prejudicial error.

The court's ruling is correct. Upon principle the same rules should govern, as regards the admissibilty of this class of evidence, in both criminal and civil cases.[13] The substance of the

12—Schearer v. Harber, 36 Ind., 536.

"There is no difference as to the rules of evidence between criminal and civil cases. What may be received in one case may be received in the other; and what is rejected in the one ought to be rejected in the other. A fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence." Russell on Crimes, vol. 2, page 725. "An opinion appears prevalent with a part of the legal profession in this country that in *criminal prosecutions* greater strictness of proof is required, and nicer and closer exceptions allowed, than in *civil cases*. It is very true, that in criminal cases, and especially those involving the life of the accused, courts proceed with greater caution, particularly in regard to the *degree* or *quantity of the evidence* necessary to a conviction. But whatever indulgence the humanity and tenderness of judges may have allowed in practice in favor of life or liberty, it appears to be well settled that the rules of evidence in civil and in criminal cases are the same." Bartley, C. J., in Summons v. State, 5 Ohio St., 325, 352. (The opinion by Bartley, C. J., in this case, is a most excellent exposition of the law upon this branch of evidence.) To the same effect are the following: 1 Greenleaf on Evid., sec. 65; Roscoe's Crim. Evid., 1; Rex. v. Watson, 3 Eng. C. L., 291; Murphy's Case, 34 Eng. C. L., 402; United States v. Britton, 2 Mason, 464, 468.

testimony given at the former trial is sufficient in either case.[14] The admissibility of such evidence does not violate a provision of the constitution which requires that "In any trial, in any court, the party accused shall be allowed to meet the witnesses face to face." This constitutional guaranty of a fundamental principle well established and long recognized at common law, has reference to the *personal presence* of the witnesses called to testify, and not the *quality* or *competency* of the evidence given.[15]

11. A is on trial for larceny. The prosecution, against objection, seeks to prove by B, who was present at A's preliminary examination, the substance of A's testimony given at that examination against A. H is now dead. The question is, whether the testimony offered is legally relevant.

The testimony offered is legally relevant. As regards the admissibility of this class of evidence, no substantial reason exists for making any distinction between criminal and civil cases.[16]

12. A is on trial for larceny. The prosecution offers in evidence, against objection, the testimony of B, since deceased, as taken down by the official stenographer at a formed trial. The stenographer testifies that the minutes objected to are substantially correct, and contain the whole of B's testimony given at the former trial. The question is, whether the stenographer's notes are legally relevant.

The notes in question are legally relevant. They are verified by the one who took them, and are adopted as a record of *past* recollection.[17]

13. A sues B for the purchase price of certain logs that were burned. The only important question in issue is, whether the title had passed or not. At a former trial, between the same parties, and relating to the same transaction, C testified on B's be-

14—State v. Able, 65 Mo., 357; Cornell v. Green, 10 Serg. & Rawle (Pa.), 14; Summons v. State, 5 Ohio St., 325.

15—Com. v. Richards, 18 Pick., 434; Summons v. State, 5 Ohio St., 325.

16—The United States v. Macomb, 5 McLean (U. S. C. C.), 286; Ruch v. Rock Island, 97 U. S., 693.

17—Jackson v. State, 81 Wis., 127.

half. The question is, whether, (1) The testimony given by C on the former trial, as contained in the record used in the Supreme Court, is admissible as impeaching evidence; (2) The minutes of the court stenographer constitute original evidence, the stenographer being absent, and the minutes not having been verified.

The testimony of C, as contained in the record used in the Supreme Court, is not admissible as impeaching evidence. But the evidence, as printed in the record, may be read to C in his cross-examination, and then he may be asked if he did not so testify at the former trial.

As the minutes of the stenographer are not verified and adopted as a record of past recollection, they are not original evidence, but mere hearsay; and, unless made admissible by statute, or rule of court, have no more force than minutes taken by any other person during the progress of the trial.[18]

14. A sues B on a contract. The question is, whether the testimony given at a former trial of the case, nine years before, by a witness since deceased, may be given by C, who was present at the former trial, and took notes of all the former testimony that was material, and who, upon refreshing his recollection from the notes, can give the substance of the *words* of the former testimony.

The evidence offered by C, of the substance of the *words* of the former testimony, is admissible, even in Masachusetts, where the rule, as regards the admissibility of this class of evidence, is more rigid than the general rule in this country.[19]

15. A sues B in assumpsit. The statute provides that the death of an adverse party renders the surviving party incompetent as a witness against the representative of the deceased party. The question is, whether testimony given at a former trial of the case, by the survivor, in the lifetime of the deceased, is legally relevant.

This question is a peculiar one. The testimony given at the former trial is admissible, however, as it does not come within the purview of the statute.[20]

18—Toohey v. Plummer, 69 Mich., 345.

19—Costigan v. Lunt, 127 Mass., 354.

20—Walbridge v. Knipper, 96 Pa. St., 48.

16. A sues B in assumpsit. The question is, whether testimony given at a former trial of the case, by a witness whose infirmity by reason of old age, renders it difficult for him to be present, is legally relevant.

This is a matter which rests in the sound discretion of the court. Such testimony has been held legally relevant.[23]

17. A sues the B Ry. Co. to recover damages for the killing of A's intestate by reason of alleged negligence on the part of the defendant. The question is, whether the deposition of a witness taken before the coroner, upon an inquest upon the body of the deceased, the witness being dead, is legally relevant.

According to the English rule, which is based upon an Act of Parliament,[24] the deposition is admissible. According to the general rule in this country, it is not. In Illinois, such evidence is excluded.[25] In Alabama, if the evidence was reduced to writing, and the witness is since deceased, it is held admissible.[26] The admissibility of such evidence seems to rest wholly upon statutory enactment.[27] The inquest is not a judicial proceeding between the same parties, and, upon principle, such evidence, it seems, should be excluded, unless the party against whom it is given has a full opportunity to cross-examine the witness.[28]

18. A sues B for damages for assault and battery. B, against objection, offers in evidence testimony given on his behalf, in a criminal proceeding in a justice's court, concerning the same offence, by a witness since deceased. The court excludes the testimony, and A recovers a verdict. The question is, whether the court's ruling is prejudicial error.

Where, by statute, the complainant, in a criminal prosecution in a justice's court for assault and battery, has control of the prosecution, and may examine all witnesses at the trial, in a subsequent civil action by such complainant to recover damages for the same assault and battery, evidence given at the former trial on behalf of the defendant, by a witness since deceased, is admissible, provided the complainant, at the former trial, had

23—Thornton v. Britton, 144 Pa. St., 126 (22 Atl. Rep., 1048).

24—Sills v. Brown, 9 C. & P., 601; 7 Geo. IV., ch. 64, sec. 4.

25—P. C. & St. L. Ry. Co. v. McGrath, 115 Ill., 172.

26—Durpree v. State, 33 Ala., 380 (73 Am. Dec., 422).

27—2 Starkie Evid., 490, Marg.

28—Charlesworth v. Tinker, 18 Wis., 633 (star page); Gavan v. Ellsworth, 45 Ga., 283.

full opportunity to cross-examine such witness. Assuming that such a statute was in force, the ruling of the trial court is prejudical error.[29]

19. A is on trial, in the Superior Court, for unlawfully keeping for sale intoxicating liquors. Evidence given at a former trial of the case, in the lower court, by a witness who is now too ill to attend court, is offered, against objection. The question is, whether such evidence is legally relevant.

Upon this question, courts do not agree. Some discriminate between criminal and civil cases. Some reject such evidence in both classes of cases. Again, some discriminate between the disability of death, and other classes of disabilities. When the two important essentials,—sanction of an oath, and full opportunity to cross-examine the witness,—are present, such evidence, upon principle, should be held admissible, irrespective of the nature of the action, or the nature of the disability.[30] But, according

29—Charlesworth v. Tinker, 18 Wis., 633 (star page).

30—"The general principle, therefore, should be that in all cases where the party has without his own fault or concurrence irrevocably lost the power of producing the witness again, he should be dispensed from doing so, if there is at hand his testimony already subjected to cross-examination; and this general notion underlies all the cases of dispensation. But it is not rationally and consistently applied." 1 Greenl. on Evid. (16th ed.), p. 283.

"Although the *sickness* of a witness is generally only ground for the postponement of the trial, the sickness may be of such a character as to amount to a permanent disability to testify; and in such a case it would be within the reason of the rule to admit the testimony given on the former trial, and this has been recognized as an exception by the English statutes. In *criminal cases* a stricter rule obtains on this subject than in civil actions. It has been held in a few instances that such testimony can not be given in criminal cases, even although the witness is dead." The Law of Evid. by Burr W. Jones.

In support of the last sentence, Professor Jones cites but one case, Finn v. Com., 5 Rand (Va.), 701. In that case, however, the testimony offered was not that of a witness since deceased, but of one *admitted to be living*, but who had removed from the state. Moreover, the ruling in that case, in rejecting the evidence given at the former trial, was based upon a statement in Peak's Evidence, p. 60, which rests solely upon the authority of Sir John Fenwick's case, 5 Harg. St. Trials, 62, which was a proceeding in Parliament by bill of attainder on a charge of high treason; in which proceeding the evidence offered and re-

to the Supreme Court of Massachusetts, testimony given at a former trial, by a witness who is too ill to attend the subsequent trial, is, by the weight of authority, inadmissible in criminal cases.[31]

jected was not that of a witness since deceased, nor was it evidence given at a former trial between the *same parties*, where the adverse party had been given an *opportunity for cross-examination*. The evidence rejected in that case was evidence given by a material witness whom Lady Fenwick had spirited away, and who had testified, not in a proceeding against *Fenwick*, but in a proceeding against one *Cook* for the same treason.

See the admirable opinion of the court, by Chief Justice Bartley, in Summons v. The State, 5 Ohio St., 325 (pp. 343, 344).

31—Com. v. McKenna, 158 Mass., 207.

ILLUSTRATIONS ON DYING DECLARATIONS.

1. A is on trial for perjury. The question is, whether the dying declarations of B, which tend to establish the perjury in issue, are admissible in evidence against A.

The dying declarations of B are inadmissible. Such declarations are admissible in evidence only in homicide cases; and then, only when the death of the declarant is the subject of the charge, and its cause and attendant circumstances the subject of the dying declaration.[1]

2. A, the next of kin and personal representative of his deceased son B, sues the C. Ry. Co. for damages for negligently causing B's death. The question is, whether B's dying declarations, relating to the cause of his death and the attendant circumstances, are admissible in evidence against the Ry. Co.

B's dying declarations are inadmissible. Notwithstanding the fact that they relate to the cause of his death and the attendant circumstances, the action against the Ry. Co. is a civil one for damages, and not a criminal prosecution for B's homicide.[2]

3. B is on trial for the murder of A. In reply to the question, "What reason, if any, had the man for shooting you?" A, while *in extremis*, with all hope of recovery gone, said: "Not any that I know of, he said that he would shoot my damned heart out." The question is, whether A's dying declaration is admissible against B.

Dying declarations, to be admissible in evidence, must be statements of *facts*, and not of *opinions*. In this case, however, A's dying declaration is the statement of a fact, and therefore admissible.[3]

4. B is on trial for the murder of A. The question is, whether A's dying declaration, in substance that A struck B and B was not to blame, is admissible against B.

A's dying declaration is inadmissible. It "affords no evi-

1—King v. Mead, 2 B. & C., 605 (1824); North v. People, 139 Ill., 82; Simons v. People, 150 Ill., 66; Mattox v. United States, 146 U. S., 151.

2—Marshall v. Chicago, etc., Ry. Co., 48 Ill., 479.

3—Boyle v. The State, 105 Ind., 469.

dence of anything more than a truly christian spirit on the part of one who had been unjustly done to death, and who in his dying agonies, was willing to forgive the malefactor.''[4]

5. B is on trial for the murder of A. The question is, whether A's dying declaration, ''I believed he (the defendant) was going after his pistol when he went into the house. I had seen him at the house with a pistol before'', is admissible against B.

A's dying declaration is inadmissible. It does not relate to the act of A's homicide, or to the attendant circumstances which form part of the *res gestae,* but to previous events. Then again, the former of the two statements is an expression of mere opinion, and not the expression of a fact.[5]

6. B is on trial for the murder of A. The court instructs the jury that, ''the dying declarations of deceased, given in evidence on the part of the state, are to be received and considered by the jury with the same degree of credit as if testified to under oath on examination in this trial.'' B is convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for ten years. The question is, whether the court's instruction is prejudicial error.

The court's instruction is incorrect, and is prejudicial error.[6]

7. B is on trial for the murder of A. A's dying declarations, imputing to B the commission of the crime, are admitted in evidence. The court instructs the jury that dying declarations are ''worthy of more credence under such circumstances than if made under the sanctity of an oath duly administered, according to law.'' B is convicted. The question is, whether the court's instruction is prejudicial error.

The court's instruction is clearly erroneous, and prejudicial error.[7]

8. B is on trial for the murder of A. A's dying declarations, imputing to B the commission of the crime, are admitted in evidence. B is convicted. A's wound, at the time he made

4—Moeck v. The People, 100 Ill., 242; Adams v. The People, 47 Ill., 376.

5—The State v. Vansant, 80 Mo., 67.

6—The State v. Mathes, 90 Mo., 571; People v. Kraft, 148 N. Y., 631.

7—Walker v. State, 37 Tex., 366.

the declarations, was a very dangerous one, but not necessarily fatal. His physician had previously stated, in his hearing, that "the chances were against him," and that "his wound was very dangerous"; but A gave no outward manifestation that he had abandoned all hope of recovery. The physician testifies, that he believes that A, at the time he made the declarations, had given up all hope of recovery. The question is, whether the court errs in admitting in evidence A's declarations.

The court, in admitting A's declarations, commits prejudicial error. The fact that the deceased had given up all hope of recovery, must be determined from facts proved, and not by the mere opinions of witnesses. No weight can be given to the testimony of a witness giving it as his opinion that a wounded person, at the time of making a statement of the facts of the case, believed he was about to die, without giving any facts upon which such opinion is based. The fact, that the deceased had given up all hope of recovery, may be proved by statements made by him, or acts performed; or, it may be inferred from statements made to him by medical or other attendants, or from the manifestly dangerous condition of the party. It must, however, by some mode of proof, affirmatively appear that all hope of recovery had been abandoned.[8]

9. B is on trial for the murder of A. The question is, (1) whether the preliminary facts which form the basis of admissibility of A's dying declarations should be stated to the court in the presence of the jury; and, (2) whether, assuming that the declaration is admissible, the substance of it may be given if the exact language cannot.

The preliminary facts should, in the first instance, be given in the absence of the jury. If the declaration be held admissible, the whole evidence, including the preliminary facts pertaining to the declarant's condition and frame of mind when he made the declaration, should be given in the presence of the jury, in order that they may intelligently pass upon its credibility and weight.

If the witness is unable to give the exact language of the dying declaration, he may give the substance. "A conscientious witness will rarely undertake, under oath, to give the exact

8—Westbrook v. The People, 126 Ill., 81.

words of another, spoken at another time, and on a different and remote occasion. The substance of the words, if the exact words cannot be given, is all the law requires."[9]

10. B is on trial for the murder of A. The state offers in evidence A's dying declarations. The court, against objection, permits the preliminary evidence, in regard to the admissibility of the dying declarations, to be given in the presence of the jury. The dying declarations are admitted in evidence against B, and he is convicted. The question is, whether the court committed prejudicial error in permitting the preliminary evidence to be given in the presence of the jury.

Since the dying declarations are admitted, the court's ruling is not prejudicial error. If, however, the dying declarations are excluded, then the jury might be improperly affected by the preliminary evidence; and to avoid the possibility of this, it is held that the jury should always be withdrawn before the preliminary evidence is introduced.[10]

11. B is on trial for murdering A by administering to her a capsule containing strychnine. About twenty-five minutes before A's death, she stated to her sister that B, to whom she was engaged to be married, had given her a capsule to bring back her monthly courses. She also said to her sister, "I gave way to him." Before making these statements, she threw up her arms and said to one of her sisters, "Don't leave me any more," and, at the same time, as the witness expressed it, "grasped around me." She also stated to her two sisters, in speaking about the capsule, "I believe it will kill me." A died in convulsions a few hours after taking the capsule. The question is, whether A's statements are admissible against B as dying declarations.

A's statements are admissible. Her declarations and acts show clearly that she fully realized and believed that her death was inevitable and near at hand; and the statements in question pertain to the cause of her death and the attendant circumstances.[11]

9—Starkey v. The People, 17 Ill., 16; Montgomery v. The State, 11 Ohio, 424.

10—North v. The People, 139 Ill., 81; Starkey v. The People, 17 Ill., 23.

11—Simons v. The People, 150 Ill., 66.

12. B is on trial for the murder of A, by administering to her, repeatedly, large doses of calomel, with intent to produce a criminal abortion, as a result of which A died. Oral dying declarations of A are offered in evidence by the state against B, and objected to on the ground that these oral declarations were repeated by A at different times, and, upon one of these occasions the declarations were reduced to writing, and therefore the written declarations are the best evidence. The court overrules the objection, and B is convicted. The question is, whether the court's ruling is prejudicial error; and also, whether the people are restricted to proof of declarations made upon one occasion only.

The court's ruling, in admitting the oral dying declarations of A, is not prejudicial error. When dying declarations are reduced to writing, and signed by the declarant, the writing is the best evidence of the statement made at that time, and must be produced, or its absence accounted for; but the fact that a dying declaration has been reduced to writing will not preclude evidence of unwritten dying declarations made upon other occasions; and such declarations may be proven as made from time to time.[12]

13. D is indicted for murdering his grandfather, A, his uncle, B, and a third person, D, by giving them whiskey in which he had put strychnine, and which they all drank at the same time, and died from its effects. He is put upon trial for the murder of his grandfather, A; and the question is, whether the dying declarations of his uncle, B, against objection, are admissible in evidence against him.

Since the three murders grew out of the same act, or transaction, B's dying declarations, according to the better view, and which has been recognized both in England and in this country, are admissible in evidence against D, when upon his trial for the murder of A. The decisions, however, upon this question, are in conflict; and perhaps the weight of authority, in this country, is to the contrary.[13]

12—Dunn v. The People, 172 Ill., 582 (1898); Bishop on Crim. Prac., § 1213; Wharton on Crim. Evid., § 295; McClain on Crim. Law, § 429.

13—The State v. Terrell, 12 Richardson (S. C.), 321; Same case, 13 Am. Rep., bot. p. 745; Rex v. Baker, 2 Mood. & Rob., 53; Same case, Thayer's Cases on Evid., 365;

14. B is on trial for the murder of A. A was found dead three hundred yards from his house. On the same morning, his wife was found lying across her bed in the house, unconscious, and with her face and head terribly beaten and disfigured, of which wounds she died shortly afterward. The house had the appearance of having been robbed, and there is no doubt that robbery led to the murder, of both A and his wife. After recovering consciousness, A's wife made dying declarations charging B with committing the crimes. The court, against objection, admits these dying declarations in evidence, and B is convicted. The question is, whether the court's ruling, in admitting the declarations, is prejudicial error.

The court's ruling is prejudicial error. The fact that A's body was found three hundred yards from the house, while his wife was discovered terribly mutilated in the house, tends to show that the two murders were *different* transactions; and therefore, the dying declarations of A's wife are inadmissible against B, when upon his trial for the murder of A.[14]

15. B and C were arrested and indicted for the murder of A. Before their case was called for trial, B was taken from the jail and hanged by a mob. Just before the hanging, he made a confession, which implicated himself as A's murderer and completely exonerated C. C is now upon trial for the murder of A, and the question is, whether B's confession is admissible in evidence in C's behalf, either as a confession, or as a dying declaration.

B's declaration is inadmissible. As a confession it is inadmissible because it was not made by the person who is being tried. As a dying declaration it is inadmissible because it was not made by the person whose homicide is the subject of the charge against C.[15]

16. B and C are on trial for the murder of A. To prove

State v. Wilson, 23 La. Ann., 559. *Contrary:* State v. Westfall, 49 Ia., 328; Krebs v. State, 3 Tex., App., 348; State v. Bohan, 15 Kan., 407; Poteete v. State, 9 Baxt. (Tenn.), 270; same case, 40 Am. Rep., 90; State v. Fitzhugh, 2 Oregon, 233.

14—Brown v. Com., 73 Penn. St., 321; same case, 13 Am. Rep., 740.

15—Mitchell v. Com., 12 Ky. L. Rep., 458; same case, 14 S. W. Rep., 489.

the identity of B and C, as the murderers of A, the state offers in evidence, against objection, the following dying declaration of A: "I am satisfied that the Roddy boys (the defendants), brought to my house by the officers, are the same men that robbed and tortured me." A had previously given a vivid description of the circumstances connected with the transaction, in which he had pointed out that he had had ample opportunity to acquire personal knowledge of a full description of them, so as to enable him to readily recognize them again. The question is, whether A's dying declaration is admissible in evidence for the purpose intended.

Since the identification of the defendants is a circumstance pertaining to A's death, and the dying declaration made by him in regard to it is the statement of a fact, and not the mere expression of an opinion, the declaration is admissible.[16]

17. B is on trial for the murder of his wife, A, who was shot through a window, at night. While *in extremis*, and after abandoning all hope of her recovery, A stated that her husband shot her; that he had said that he would shoot her through the window, if she did not sign certain papers concerning some money. She made no pretense, however, of recognizing the person who shot her. The court, against objection, admits A's dying statements in evidence, against B, and he is convicted. The question is, whether the court's ruling, in admitting A's dying statements, is prejudicial error.

The court's ruling, in admitting A's dying statements in evidence, is prejudicial error. As she had no knowledge as regards who the person was who shot her, her statement that he was her husband was the expression of a mere opinion, and therefore, inadmissible; and her statement of B's previous threat relates to a fact which was not an attendant circumstance of her homicide, and therefore it is inadmissible.[17]

18. B is on trial for murdering A, by using instruments on her to effect an abortion, as a result of which she died. A's

16—Com. v. Roddy, 184 Pa. St., 274; Brotherton v. The People, 75 N. Y., 159; McLean v. State, 16 Ala., 672.

17—Binns v. The State, 46 Ind., 313; State v. Perigo, 80 Iowa, 37; State v. Draper, 65 Mo., 335; State v. Wood, 53 Vt., 560. *Contra*, on second point, People v. Beverly, 108 Mich., 509.

dying declarations, that, "He is the cause of my death. Oh, those horrible instruments! Laws. is the cause of my death, he is my murderer. They abused me terribly," are, against objection, admitted in evidence, against B, and he is convicted. The question is, whether the court's ruling, in admitting A's dying declarations, is prejudicial error.

The court's ruling is prejudicial error. To be admissible in evidence, dying declarations must be definite and clear. Vague and indefinite expressions are inadmissible. A's dying declarations did not expressly charge B with using or procuring the use of the instruments on her, but were such as A might naturally have made about her seducer, without intending to charge him with anything more than her seduction.[18]

19. B is on trial for the murder of his wife, A. A's dying declarations against B are offered in evidence by the state, and objected to on the ground that A, at the time she made them, was under the influence of opiates. The court overrules the objection, and B is convicted of murder, in the second degree. The question is, whether the court's ruling, in admitting A's dying declarations, is prejudicial error.

The court's ruling is not prejudicial error. The fact that A, at the time of making her declarations, was somewhat under the influence of narcotics, may affect the credibility of her declarations, but not their admissibility.[19]

20. B is on trial for the murder of A, a child four years old. The question is, whether A's dying declarations, against objection, are admissible in evidence against B.

Since A would be an incompetent witness, were he living and upon the witness stand, therefore his dying declarations are inadmissible.[20]

21. B is on trial for the murder of A. A's dying declarations are offered in evidence against B, and objected to on the ground that to admit them would be a violation of the constitutional provision which secures to the accused the right to be

18—State v. Baldwin, 79 Ia., 714; People v. Olmstead, 30 Mich., 431.

19—People v. Beverly, 108 Mich., 509; Hays v. Com. (Ky.), 14 S. W. Rep., 833.

20—Rex v. Pike, 3 C. and P., 598; same case, 14 E. C. L., 473.

confronted with the witnesses against him face to face. The question is, whether the objection should be sustained or overruled.

The objection should be overruled. Magna Charta provides that a person accused of crime shall be tried according to the principles of the common law. It also provides that the witnesses against him shall be examined in his presence. At common law dying declarations have always been held admissible; and to admit them has never been considered a violation of any right secured to the subject by Magna Charta. In view of these facts, it follows by analogy that it was not the intention of the framers of the constitutional provision in question to exclude dying declarations; and therefore this provision is to be interpreted in accordance with that intention.[21]

22. B is on trial for the murder of A. A's dying declarations, made upon the day he received the wounds which caused his death, and when he fully expected to die, are offered in evidence, and are objected to because A, at a time subsequent to the making of them, expressed a hope of recovery; and lived for ten days after they were made. The question is, whether the declarations are admissible.

The declarations are admissible. The fact that A subsequently expressed a hope of his recovery does not exclude them, nor the fact that he lived for ten days after he made them.[22]

23. B is on trial for the murder of A. A's dying declaration is admitted in evidence in behalf of the people. The question is, whether B may introduce evidence that A, at the time he made the declaration, was in a reckless and irreverent state of mind; that, at or about the same time, he used profane language; and that, in making the declaration he was influenced by malice and revenge.

All of these facts are admissible in evidence to impeach A's dying declaration.[23]

21—State v. Houser, 26 Mo., 431; Com. v. Gratt. (Va.), 607; Miller v. State, 25 Wis., 384; Jackson v. State, 81 Wis., 127; Com. v. Richards, 18 Pick., 434.

22—Swisher v. Com., 26 Grat., 963; 21 Amer. Rep., 30; State v. Poll, 1 Hawks, 442; 9 Amer. Dec., 655.

23—Tracy v. The People, 97 Ill., 101.

ILLUSTRATIONS ON DECLARATIONS RELATING TO PEDIGREE.

1. A sues B in ejectment. A sets up that he is the heir-at-law of C, who died seised of the land. B denies this, and alleges that A is illegitimate. The question is, whether declarations, made by A's father and mother, who are now deceased, that A was born before they were married, are admissible in evidence.

The declarations are admissible. If, however, A had been born during lawful wedlock of his father and mother, declarations by them that A was illegitimate would not be admissible. The basis of this rule is decency, morality and public policy.[1]

2 A sues B in ejectment to recover Black Acre. To prove that he is the legitimate son of X, A offers in evidence, against objection, a deposition made by C, a blood relative of A, in a suit in chancery instituted by A against D, to perpetuate testimony to the alleged fact, disputed by D, that A is the legitimate son of X, in which character, in the suit by A against D, A claimed an estate in remainder in White Acre, which was also claimed in remainder by D. C is now dead. In the present action, B does not claim title under either A or D. The question is, whether C's deposition, made in the former suit, is admissible.

The deposition of C is inadmissible. It was made after a dispute had arisen in regard to A's legitimacy. Declarations relating to pedigree, to be admissible in evidence, must have been made *ante litem motam*.[2]

3. A, who claims title to a certain piece of land, files a bill to redeem. A declaration by B, that his wife was illegitimate, is offered in evidence, against objection. The declaration is material to the issue, and B is now dead. The question is, whether the declaration is admissible.

The declaration is admissible. B's knowledge, as regards the illegitimacy of his wife, is likely to have been more intimate, and stronger, than that of many of her blood relatives. His own honor, as well as that of his family, is closely connected with the question of his wife's legitimacy.[3]

1—Goodright d. Stephens v. Moss, Cowper, 592.

2—Berkeley Peerage Case, 4 Campbell, 401.

3—Vowles v. Young, 3 Ves., 140, (1806).

4. A sues B in ejectment. To recover, he must prove that he is the legitimate son of W, who is now dead. To do this, he offers in evidence, against objection, an entry in the family bible of W, in W's handwriting, that A is W's eldest son, born in lawful wedlock, of G, W's wife, on May 1st, 1875, and signed by W himself. The question is, whether the entry is admissible.

Since the declarant was qualified to make the entry, and is now dead, the declaration made *ante litem motam,* and a question of A's pedigree involved in the issue, the entry is admissible. Moreover, since the declaration is contained in the family bible, the genuineness of the declaration is presumed.[4]

5. A, as the heir of C, a brother of A's father, sues B in ejectment. B denies that A is C's heir, on the ground that A's parents were never married. To prove his heirship, A offers in evidence, against objection, a declaration made by D. since deceased, and who was a sister of A's mother to the effect that A's father and mother were legally married before A was born. The question is, whether D's declaration is admissible.

D's declaration is inadmissible. That the declarant was qualified to make the declaration must first be established by evidence *de hors* the declaration. To do this, A must prove by independent evidence that his parents were married before he was born. Even then, according to the strict English rule, the declaration, owing to D's disqualification, would be inadmissible.[5]

6. A files a bill for partition of certain real estate, which descended from B, who died intestate. A claims an interest in the land as B's lawful son. The defendants, C and D, deny this. The question is, (1) whether parental recognition of A, by B and his wife, in whose family A was brought up, raises a presumption of parentage; (2) whether a declaration by B, that A is his lawful son, is admissible; (3) whether suspicions, doubts and rumors, among B's neighbors, as to A's parentage, are admissible; (4) whether such suspicions, doubts and rumors, rise to the dignity of a "controversy" sufficient to exclude subsequent declarations of B as regards A's parentage.

4—Berkeley Peerage Case, 4 Camp., 401.

5—Blackburn v. Crawfords., 3 Wall., 9; Dunlop v. Servas, 5 U. C. Q. B., 288.

(1) Parental recognition of A, by B and his wife, does raise a presumption of A's parentage, sufficient to establish a *prima facie* case; (2) B's declaration, that A is his lawful son, is clearly admissible; (3) Suspicions, doubts and rumors, among B's neighbors, are not admissible; (4) nor do such suspicions, doubts and rumors, rise to the dignity of a "controversy" sufficient to exclude subsequent declarations of B as regards A's parentage.[6]

7. A files a bill for the partition of certain lands which had belonged to one H, and which are now claimed both by H's parents and by her daughter S. The parents claim that S is illegitimate, and therefore cannot take by descent. The question is, whether testimony, offered by two of the nephews of S, that they had heard their father say, when speaking of their aunt, S, upon occasions which they could not fix with any distinctness, and in conversations which they could not recall with any clearness, that H had no husband, and that her daughter was illegitimate, rises to the dignity of that general repute in the family which the law regards as competent evidence in respect to pedigree, and sufficient to repel the presumption of marriage.

The presumption of legitimacy is not lightly to be repelled. Clear and strong evidence is essential to overcome it. The testimony offered by the nephews of H is not general repute in the family at all, but merely the specific hearsay statements of a single member of the family, and is insufficient to repel the presumption of S's legitimacy.[7]

8. A sues B for the price of certain horses. B's defence is the plea of infancy. In support of his plea, B offers in evidence, against objection, an affidavit, made by B's father, since deceased, in a suit in chancery, to which suit A was not a party. The affidavit states that B was born "on or about the 20th of May, 1882." The question is, whether the affidavit is admissible.

The question of infancy is not one of pedigree, hence the affidavit is inadmissible.[8]

6—Metheny v. Bohn, 160 Ill., 263.

7—Orthwein v. Thomas, 127 Ill., 554.

8—Haines v. Guthrie, 13 Q. B. D., 818; Conn. Mut. L. Ins. Co. v. Schwenk, 94 U. S., 593.

9. A, who claims title by descent to certain lands, bases his claim upon the ground that he is the natural son of the intestate. B, the adverse claimant, denies this, and alleges that A is the legitimate son of the intestate's sister. The question is, (1) whether the declarations of the intestate's sister, since deceased, that A is the lawful son of the declarant, are admissible; and also, (2) whether her declarations that A is the natural son of the intestate, are admissible.

In the former case, the declarations are clearly admissible. In the latter case, they are not admissible, at common law. Where, however, a statute creates the relation of ancestor and heir between the mother and her illegitimate child, some courts hold that such declarations are admissible.[9]

10. A, who is on trial for murder, pleads insanity. To support his plea, he seeks to show that his great-aunt was insane. To prove this fact, he offers in evidence, against objection, general repute in the family. The question is, whether this evidence is admissible.

Insanity is not a question of pedigree, and cannot be proved by general repute in the family.[10]

11. In an action on a lease for lives, a material fact in issue is, whether a certain one of the *cestui que vie* is living. The question is, whether evidence of general repute in his family, that he is dead, is admissible.

General repute in the family is admissible where questions of pedigree are involved. In this case, however, the question is not one of pedigree, hence the evidence of general repute is inadmissible.[11]

12. A sues B in ejectment. B pleads non-joinder of parties, claiming that one X, a joint tenant with A, should have been made a party plaintiff. To meet B's plea, A seeks to show that X is dead. To prove this, he offers in evidence, against objection, general repute in the family of X that X was killed in an explosion. The question is, whether this evidence is admissible.

9—Northrop v. Hale, 76 Me., 306.
10—People v. Koerner, 154 N. Y., 355, 370.
11—Whittuck v. Walters, 4 C. and P., 375.

According to some decisions, this evidence is admissible on the theory that the question of death is one of pedigree. According to other decisions it is inadmissible.[12]

13. A seeks to recover certain real estate on the ground that he is an illegitimate son of the testator's daughter since deceased. The statute provides that, "Bastards shall be capable of inheriting or transmitting inheritance, on the part of their mother, in like manner as if they had been born in lawful wedlock. And if the mother be dead, the estate of such bastard shall descend to the relatives on the part of the mother as if the intestate had been legitimate." In support of his claim, A offers in evidence, against objection, a declaration of B, since deceased, and who was a blood relative of A, that A was the illegitimate son of the party claimed. The question is, whether the declaration of B is admissible.

According to the decisions of the English and the federal courts, and of some of the state courts, B's declaration is inadmissible. These courts hold that "Where a relationship is acknowledged as a matter of fact, and its lawfulness only is disputed, hearsay from members of the family may be introduced to show that such relationship was lawful or was unlawful. But hearsay cannot be introduced to establish an unlawful relationship *per se,* where a lawful relationship is not claimed."[13]

14. A files a bill to establish his claim to certain lands which had belonged to his brother, who A claims is dead. To prove his brother's death, his sister offers evidence, against objection, that the general opinion in the family is, that Moses Miner, the brother in question, was a soldier in the New York troops and was killed at a certain place. The question is, whether the evidence is admissible to prove the fact of the brother's death, and the place where he died.

Since no question of pedigree is involved in this case, the evidence is inadmissible to prove either of these facts.[14]

15. A, as the illegitimate son of B, who died intestate, claims

12—Du Pont v. Davis, 30 Wis., 170.

13—Flora v. Anderson, 75 Fed. Rep., 217.

14—Jackson v. Boneham, 15 Johns. (N. Y), 226.

property left by B. C, the defendant, denies that A is the illegitimate son of B. To support his claim, A offers in evidence, against objection, declarations of D, a brother of B, which tend to show that A is the illegitimate son of B. D is now dead. The question is, whether the declarations of D are admissible.

At common law, D's declarations are inadmissible; and, even under a statute which creates the relation of ancestor and heir between B and A, his declarations are inadmissible according to the rule which obtains in the English and the Federal courts, and also in many of the State courts. The one reason is, that since A is *filius nullius* he has no pedigree, and therefore no question of pedigree is involved in the case. Another reason is, that courts refuse to allow hearsay evidence to be introduced to establish illegal relationship, where a lawful relationship is not claimed.[15]

16. A sues B for the value of a dog. To prove its value, he offers evidence of the dog's pedigree. This evidence is objected to on the ground that the matter involved is attempted to be shown by general reputation, and this is characterized as hearsay. The question is, whether the evidence is admissible.

The evidence is admissible. "The question of pedigree and ancestry is a matter of common or general reputation, whether the question concerns horses, cattle, dogs or men. The matter, from the very nature of things, depends upon reputation or common repute. It is shown that certain books are kept, and in them there is a registration of pedigrees, kept up for the information of the public, not only as to horses, but also as to cattle and dogs. These are shown to be received as satisfactory evidence of pedigree in the same manner and upon the same idea as entries in family records of births, deaths and marriages are received with regard to the human family (citing cases). It is true that in family records the entries in the books are usually made by the relatives and friends of the person, but inasmuch as dogs have no relatives competent to make entries for them, it is allowable for such entries to be made by the owners, friends, and admirers of the dog."[16]

15—Crispin v. Doglioni, 3 Swab. and Tr., 44.

16—Citizens' Co. v. Dew, 100 Tenn., 317.

17. The town of A sues the town of B in an action of contract for the support of one C, a pauper. The decision of the case turns upon the legitimacy of C's father, whose parents were married in 1850. A contends that C's father was born in 1851, and therefore legitimate. B, to prove the illegitimacy of C's father, puts a witness upon the stand who testifies that she saw C's father, then an infant, during the lifetime of one S, who, it is alleged, died in 1849. To prove that S died in 1849, B offers in evidence, against objection, a chart containing a record of the births, marriages and deaths, kept in the family of S for a long series of years, and handed down by her deceased parent to his sons as containing a true statement of the events recorded therein; and also the inscription on the tombstone erected to her memory in the family burial-ground. The question is, whether this evidence is admissible. The objection made to it is, that it is not offered to prove a fact in issue, but to prove a collateral fact from which the main fact in issue may be deduced by inference.

The evidence is admissible. Some courts, however, limit the admissibility of such evidence to cases where the main subject of inquiry relates to pedigree, and where the incidents of birth, marriage and death, and the times when these events happened, are directly put in issue. But, according to the better view, it is equally admissible to prove an evidentiary fact. The true test is, to inquire whether the evidence is admissible to prove the fact which it is offered to establish, and not whether such fact is directly or only collaterally in issue.[17]

17—Inhabitants of North Brookfield v. Inhabitants of Warren, 82 Mass., 171.

ILLUSTRATIONS ON DECLARATIONS RELATING TO MATTERS OF PUBLIC OR GENERAL INTEREST.

1. A sues B in trespass for breaking and entering A's close. B pleads a prescriptive right of common to the land in question. To prove his plea, B offers reputation-evidence, against objection, of the right claimed. The question is, whether the evidence is admissible.

The evidence is admissible, even under the English rule. The prescriptive right of common claimed by B is not merely a private right, but a general one at least.[1]

2. A sues B in replevin to recover certain cattle which had been distrained damage-feasant. The material question in issue is, the location of the boundary dividing the estate which comprised the *locus in quo* from another estate. Reputation-evidence is offered, against objection, to prove the boundary of a hamlet which boundary is co-incident with the one in issue. The question is, whether the evidence is admissible.

The evidence is admissible. Reputation-evidence is admissible to prove an evidentiary fact, as well as a main fact, in issue.[2]

3. The fact in issue is the location of the boundary of a certain highway, and the question is, whether a declaration by A, since deceased, that he planted a certain willow tree (which is still standing) to show where the boundary of the highway was when he was a boy, is admissible.

A's declaration is inadmissible. "He does not assert that he has heard old people say what was the public road; but he plants a tree and asserts that the boundary of the road is at that point. It is the mere allegation of a fact by an individual . . . That is, he knew it to be so from what he had himself observed, and not from reputation".[3]

1—Weeks v. Sparke, 1 M. & S. 679 (King's Bench).

2—Thomas v. Jenkins, 6 A. & E. 525.

3—Denman, L. C. J., in R. v. Bliss, 7 Adol. & E 550. But see Caufman v. Cedar Spring, 6 Binn. 62, and Sasser v. Herring, 3 Dev. L. 342, where, in the former case, Tiligman, C. J., says: "Where boundary is the subject, what has been said by a deceased person is received as evidence," and, in the latter one, Henderson, C. J., says:

4. The fact in issue is the location of a private boundary, and the question is, whether the declarations of a deceased person, who appeared to have means of knowledge, and no private interest to serve in making them, are, as regards such location, admissible.

According to the English rule, the declarations are inadmissible; but, by the weight of authority in this country they are admisible.[4]

5. The fact in issue is the location of a certain private boundary, and the question is, whether the declarations of a surveyor, since deceased, of a particular fact respecting the private boundary, and which were not made coincidently with pointing it out, and generally as part of the *res gestae,* are admissible.

"We have, in questions of boundary, given to the single declarations of a deceased individual as to a line or corner the weight of common reputation. * * * Whether this is within the spirit and reason of the rule it is now too late to inquire."

4—Smith v. Powers, 15 N. H. 563. In this case, Parker, C. J., says: "It is true that the decisions in England seem to restrict the evidence of the declarations of deceased persons respecting boundaries * * * to what the deceased said relative to the public opinion respecting the boundary. But the testimony has not been limited in this country. * * * The declarations of a person deceased, who appeared to have had means of knowledge and no interest in making the declarations, are competent upon a question of boundary, even in a case of private right." See Morton v. Folger *et al.*, 15 Cal. 275, where Field, C. J., says: "In England, the evidence is limited to boundaries of parishes, manors, and the like, which are of public interest, and is not allowed to establish the boundary of a private estate, unless the latter is identical with that of a public or *quasi* public nature. * * * In this country the admissibility of this kind of evidence is carried to much greater length than in England. * * * It is not necessary, however, according to the authorities in the majority of the American states, that the hearsay, to entitle it to be received, should be general, or relate to boundaries in which the public or numerous persons are interested. It may be limited to particular facts embracing the declarations of a single individual, provided such individual had, from his situation, the means of knowledge, and was disinterested in the matter, and may relate only to the boundary of a private estate." After commenting on a number of cases, he adds: "These are sufficient to show the general doctrine which will be found to prevail in the majority of the American states. By them it is clear that the declarations on a question of boundary of a deceased person, who was in a situa-

The declarations are inadmissible. In questions relating to private boundaries, the declarations of a person since deceased, of particular facts, as distinguished from general reputation of such facts, are not admissible unless it is shown that the declarant had knowledge whereof he spoke, and was then on the land, or in possession of it, and was pointing out and marking the boundary, or discharging some duty in relation thereto. Declarations which merely recite something past are within the rule which excludes hearsay.[5]

6. A sues B in ejectment to fix the boundary between two lots. The fact in issue is, whether the center of a certain street is the south line of the quarter section which contains the

tion to be acquainted with the matter, and who was at the time free from any interest therein, are admissible, and whether the boundary be one of a general or public interest, or be one between the estates of private proprietors."

See also the valuable note to Coate v. Speer, 3 McCord (S. C.) 227, in 15 Am. Dec. 628.

5—Hunnicut v. Peyton, 102 U. S. 333. In this leading case, Mr. Justice Strong, speaking for the court, says: "They (declarations of particular facts) are, therefore, receivable only when made coincidently with pointing out the boundaries and generally as part of the res gestae. * * * In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons, are not admissible, unless they are made by persons who, it is shown, had knowledge of that whereof they spoke, and who were on the land or in possession of it when the declarations were made. To be evidence they must have been made when the declarant was pointing out or marking the boundaries or discharging some duties relating thereto. A declaration which is a mere recital of something past is not an exception to the rule that excludes hearsay evidence."

In the celebrated Berkeley Peerage Case, 4 Camp. 415, Chief Justice Mansfield says: "The witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible." See also, Greenleaf on Evid., vol. I., § 138; Elliott on Evid., vol. I., § 395; Ellicott v. Pearl, 10 Pet. 412; Long v. Colton, 116 Mass. 414.

The statement found in the books, that reputation as to the existence of particular facts is inadmissible, is somewhat misleading. The location of a certain boundary is a particular fact, and reputation-evidence of such fact is admissible. What is meant by the statement is, that reputation-evidence to be admissible must be as to the existence of the particular right *in the abstract*, and not merely as to particular occasions of its exercise.

lots, and the question is, whether reputation-evidence is admissible to prove this fact.

The evidence is admissible. When the location of a private boundary depends upon showing a public boundary, the latter may be shown by reputation-evidence.[6]

7. A is on trial for obstructing a certain highway by inclosing certain land and building thereon. For the purpose of showing that the land was not inclosed at a certain date. The prosecution offers in evidence, against objection, a map, made by a public officer. The question is, whether the map is legally relevant.

The map is inadmissible. It is not offered to prove a right in the abstract, but merely to prove the enjoyment of a right at a particular time. To prove the former fact, the map would be admissible.[7]

8. A is indicted for the non-repair of a certain public bridge. His plea is that residents of the county are bound to repair it. To prove his plea he offers, against objection, reputation-evidence which the court rejects, and he is convicted. The question is, whether the court's ruling is prejudicial error.

The court's ruling is prejudicial error. The repair of the bridge is a matter of general interest. It concerns a private interest, it is true; but it also concerns a general one,—viz., whether the county is bound to repair the bridge. The evidence offered is therefore admissible.[8]

9. A, the sheriff of a certain county, is on trial for not executing a certain death-warrant. His plea is, that the duty of executing criminals belongs to the city sheriffs, and the question is, whether traditionary-evidence, that the sheriffs of the county had always been exempted from the performance of this duty, is admissible.

This evidence is inadmissible. The subject involved is not

6—Mullaney v. Duffy, 145 Ill. 559.

7—R. v. Berger, 12 B. D. 823. In England, ancient maps, showing public roads, and boundaries between counties, parishes, manors, etc., are admissible when it is proved that the maps were made, or recognized by persons who had knowledge of the subject, and who have since died.

8—Queen v. Bedfordshire, 4 E. & B. 535.

one of public or general interest. It concerns only individuals. The public are interested in the matter of the execution, but not as regards the particular person by whom it is to be performed.[9]

10. The fact in issue is, whether a certain turnpike is within the limits of a certain town; and the question is, whether reputation-evidence is admissible to show that the boundary of the town extends as far as a certain close, and also to show that formerly there were houses where none exist now.

Reputation-evidence is admissible to show the former fact, but not the latter one. The reason is, the former fact is one of public interest, while the later one is not.[10]

11. The fact in issue is, whether a certain place situated on the bank of a navigable river is a public landing place for all the king's subjects; and the question is, whether reputation-evidence is admissible to show that it is not.

The evidence is admissible. The fact that it is offered to negative the public right claimed, and not to affirm it, is immaterial.[11]

12. A sues B in trespass to try title. A claims that a certain gum tree is the corner of her grant. To prove this she offers in evidence, against objection, declarations of G, a chain-bearer at the time of the original survey, and who is now dead, that the gum tree was the corner then made. G's declarations were made after the action was commenced, but were merely a repetition of others made by him many years before; and the question is, whether the declarations are admissible.

One of the essentials of admissibility of this class of declarations is, they must be made *ante litem motam*. The reason is, if they are made *post litem motam* they are apt to be influenced by interest, prejudice, or passion.[12] As G's declarations, however, are merely a repetition of those made by him *ante litem motam*, the reason for the rule is not applicable, and hence the rule itself cannot apply. G's declarations, therefore, are admissible.[13]

9—R. v. Antrobus, 2 Adol. & El. 788, 794.

10—Ireland v. Powell, Salop Spr. Ass. 1802; Peake's Evid. 13, 14.

11—Drinkwater v. Porter, 7 C. & P. 181; Marquis of Anglesey v. Hatherton, 10 M. & W. 218.

12—Rex v. Cotton, 3 Camp. 444; Berkeley Peerage Case, 4 Camp. 401, 416.

13—Coate v. Speer, 3 McCord 227, 15 Am. Dec. 627.

ILLUSTRATIONS ON PUBLIC DOCUMENTS.

1. An application was made by one M for a position as consul in London for the Ligurian Republic. His application for the consulship was referred to the Giunta, an official body, and this official body made a report, based upon it, to its government. Facts in issue are, M's place of birth, his age, etc.; and the question is, whether the report made by the Giunta to its government is admissible to prove these facts.

The report is inadmissible. It is a public document in a sense, but not in the sense in which the term is used in the law of evidence. In the latter sense the term means a document which relates to a public matter, and is prepared by a public officer in the discharge of his duty for public inspection and use. The report in question contains private confidential information for use by the government.[1]

2. The fact in issue is, whether a certain steamboat, which had belonged to a citizen of the United States, had been obtained by the so-called Confederate States by capture or purchase; and the question is, whether certain extracts from the Confederate archives, in possession of the United States Government, are admissible in evidence.

The extracts are admissible. They are public documents, kept for public inspection and use and not merely as private confidential records.[2]

1—Sturla *et al.* v. Freccia *et al.*, 5 App. Cas. 623.

2—Oakes v. U. S., 174 U. S. 778. In this case, Gray, J., speaking for the court, says: "The government of the Confederate States, although in no sense a government *de jure* and never recognized by the United States as in all respects a government *de facto*, yet was an organized and actual government, * * * . No better evidence of the doings of that organization assuming to act as a government can be found than in papers contemporaneously drawn up by its officers in the performance of their supposed duties to that government.

"It would be an anomalous condition of things if records of this kind, collected and preserved by the government of the United States in a public office at great

3. G sues the village of E for damages for personal injuries to her owing to defendant's negligence. For the purpose of showing the direction and velocity of the wind and the falling of snow on the morning in question and the previous evening, G offers in evidence the record made by a person employed at Chicago by the United States Signal Service. E objects to this testimony on the ground that no law authorizes the record to be used in evidence, and the same is not competent testimony. The question is, whether the record is admissible.

The record is admissible. It is not essential that a statute requires it to be kept. It is sufficient if it is kept by a public officer in the discharge of his public duty. Nor is it essential that it be made by a public officer. It is sufficient if made under his direction by a person authorized by him to make it.[3]

4. A sues B and C on their joint agreement. B pleads insolvency and C pleads infancy. A, to prove that C was of age when she made the agreement, offers in evidence, against objection, a book which is admitted to be the church record of baptisms in a Roman Catholic church in L, regularly kept by M, the priest of that church for a series of years, produced from the custody of O, the present priest, into whose hands it came upon the death of M, and containing the following entry in M's handwriting, and signed by him: "1877, Dec. 17th, Baptized Joanna (C) born 12th, of Michael and Mary Doyle. Sponsors, Jeremiah Kennedy and Bridget Doyle." There was no law which required the record to be kept. The question is, whether it is admissible in evidence.

As a public document, the baptismal record is inadmissible. No law required it to be kept, nor was it kept by the priest in pursuance of a duty imposed upon him by public authority. In England, church registers were required by law

expense, were wholly inadmissible in a court of justice to show facts of which they afford the most distinct and appropriate evidence, and which, in the nature of things, can hardly be satisfactorily proved in any other manner."

3—Evanston v. Gunn, 99 U. S. 660.

to be kept by the established church, but not by other churches. Hence those kept by the established church were held admissible, while those kept by the other chruches were held inadmissible.[4]

The baptismal record in question, though inadmissible as a public document, is admissible as an entry made in the regular course of duty or business, by a person since deceased. This class of evidence is discussed in Chapter XV., Part II.

5. The question is, whether books known as the "American State Papers," containing copies of legislative and executive documents, reports, etc., selected and edited by the secretary of the Senate and clerk of the House, and published by order of Congress, are admissible in evidence.

These books are admissible, and are as valid evidence as the originals of the documents copied therein.[5]

6. The question is, whether the "State Register," which is the official organ of the State Government, in which the official acts of the Governor are required by law to be published, is admissible in evidence to prove facts stated in a proclamation of the Governor published therein.

The "State Register" is a public document, and as such admissible in evidence to prove the facts therein recited.[6]

7. Facts in issue are, whether a harbor exists at a certain place, and, if not, whether the government contemplate constructing a harbor there; and the question is, whether the journals of the United States House of Representatives, together with a letter of the secretary of war, and a report of a topographical engineer, reported to the house in pursuance of a resolution, and properly authenticated, are admissible in evidence to prove the non-existence of a harbor at that point, and that it was practicable, and in contemplation of the government, to construct a harbor there.

The journals, letter and report are public documents, and admissible in evidence.[7]

4—Kennedy v. Doyle, 10 Allen (Mass.) 161.

5—Bryan v. Forsyth, 19 How. (U. S.) 334.

6—Lurton v. Gilliam *et al.*, 1 Scammon (Ill.) 576.

7—Miles v. Stephens, 3 Pa. St. 22.

8. In a *quo warranto* proceeding, a material fact in issue is, the number of votes cast for the defendant in a certain election; and the question is, whether the returns of the inspectors of the election, made by a sworn officer, and coming from the proper custody, are admissible.

The returns of the inspectors are public documents, and not only admissible, but also sufficient to establish a *prima facie* case.[8]

9. In an appeal from a judgment of the County Court, confirming a special assessment, the question is, whether, in a case in which the ordinances of the city are printed in book or pamphlet form, purporting to be published by authority of the city council, such book or pamphlet is admissible in evidence to prove the passage and contents of the ordinances therein contained, and their legal publication; and also whether the certificate of the city clerk, under the seal of the corporation, is admissible to prove those facts.

The book or pamphlet is a public document, and is admissible in evidence to prove the facts stated; and the certificate is also admissible to prove those facts.[9]

10. In an action on an insurance policy the fact in issue is, whether a certain island is known among merchants and insurers as a guano island, and the question is, whether the defendants may read to the jury an article from Appleton's Cyclopædia to prove that it is.

A book published in this country by a private person is not competent evidence of facts stated therein, of recent occurrence, and which might be proved by living witnesses or other better evidence; and the book in question, not being shown to have been approved by any public authority, or to be in general use among merchants or underwriters, cannot be read to a jury on the issue whether an island is commonly called and known as a Guano island in commerce and the business of marine insurance.[10]

8—People v. Minck, 21 N. Y. 539.
9—Lindsay v. City of Chicago, 115 Ill. 120.
10—Whiton v. Albany and Narragansett Ins. Cos., 109 Mass. 24.

11. The question is, whether a plat book kept in the county recorder's office under a law requiring plats to be recorded, but not stating in what office, is admissible in evidence as a public document.

The plat book is a public document and admissible in evidence as such.[11]

12. The question is, whether a copy of a document, filed in a public office as required by a statute, is a public document, and whether a copy taken therefrom is inadmissible in evidence because of the fact that it is a copy taken from a copy.

The copy filed is a public document, and a certified copy taken from it is admissible in evidence.[12]

13. The question is, whether a certified copy of the record of a mortgage which is not acknowledged, and therefore not entitled to record, is admissible in evidence.

Since the mortgage is not entitled to record, because not acknowledged, the act of putting it upon record is void. Hence the certified copy of the void record is inadmissible.[13]

14. The question is, whether marine ordinances of foreign countries, promulgated by the President by order of Congress, are admissible in evidence as public documents.

The marine ordinances are public documents, and admissible in evidence as such.[14]

15. The question is, whether an entry made in a docket kept by the court of county commissioners for their convenience, but not for public inspection, is admissible in evidence as a judgment of said court.

Since the docket is not kept for public inspection it is not a public document, and the entry therein is therefore inadmissible.[15]

11—Miller v. City of Indianapolis, 123 Ind. 196.

12—Stone Land, &c. Co. v. Boon, 73 Tex. 548.

13—Starnes v. Allen, 151 Ind. 108.

14—Talbot v. Seeman, 1 Cranch (U. S.) 1.

15—Goggans v. Myrick, 131 Ala. 286.

16. The question is, whether a sheriff's certificate reciting the performance of acts not within the range of his official duty is admissible.

As regards the acts not within the range of the sheriff's official duty the certificate is inadmissible.[16]

17. The question is, whether market reports contained in newspapers are admissible in evidence to prove the current prices of cattle at a certain place.

Such reports are generally held admissible. As said by Cooley, J.: "As a matter of fact, such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries, or individual sales or inquiries; and courts would justly be the subject of ridicule, if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character."[17] It has been held, however, that preliminary evidence should be given showing that the prices quoted were drawn from a reliable source.[18]

18. The question is, whether a notice in a newspaper published in New York, of the death of a certain person in Texas, is admissible in New York to prove the fact of such person's death.

The newspaper notice is inadmissible.[19] Nor is a mere newspaper account of an accident admissible in a personal injury case against a railroad company;[20] nor a newspaper account of what took place at a meeting of a city council with respect to a certain sewer.[21]

16—Obermier v. Core, 25 Ark. 562. See also Parker v. Cleveland, 37 Fla. 39, where it is held that the certificate of a clerk of a circuit court as to a matter of fact is inadmissible. That the law as to certificates of such officers as custodians of records only extends to transcripts of such records, and that, if their testimony is desired upon other points, they should be regularly sworn and testify as other witnesses.

17—Sisson v. Cleveland, 14 Mich. 489, 497.

18—Whelan v. Lynch, 60 N. Y. 469.

19—Fosgate v. Herkimer Mfg., etc., Co., 9 Barb. (N. Y.) 287.

20—Downs v. N. Y. Cent. Ry. Co., 47 N. Y. 83.

21—Riley v. St. John, 11 New Bruns. 78.

19. A sues B in ejectment to recover possession of a certain lot in the city of Cincinnati. To prove the date of the survey he offers in evidence, against objection, Dr. Drake's book, called a Picture of Cincinnati. Dr. Drake is living and present in court. The question is, whether the book is admissible.

According to the general principles of the law of evidence the book is inadmissible. "All evidence of this sort must be considered as mere hearsay; and certainly, as hearsay, it is of no very satisfactory character. Historical facts, of general and public notoriety, may, indeed, be proved by reputation; and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined in a greater measure to ancient facts, which do not pre-suppose better evidence in existence; and where, from the nature of the transactions, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. . . . But the work of a living author, who is within the reach of process of the court, can hardly be deemed of this nature. He may be called as a witness. He may be examined as to the sources and accuracy of his information; and especially, if the facts, which he relates are of recent date, and may be fairly presumed to be within the knowledge of many living persons, from whom he has derived his materials, there would seem to be cogent reasons to say, that his book was not, under such circumstances, the best evidence within the reach of the parties."[22]

20. Y is on trial for the murder of her husband by administering to him poison. The prosecuting attorney is per-

22—Story, J., speaking for the court, in Morris v. Harmer, 32 U. S. 553, 558. See also State v. Wagner, 61 Me. 178. In this case Barrows, J., says: "General histories of painstaking authors long since deceased, and of established reputation, * * * are competent evidence upon a question of this nature. No one claims them as conclusive or infallible, but carefully used as aids and guides, and accepted as true where their statements are uniform and consistent with the evidence of original records and admitted or well known facts, they will be found of great service in arriving at a satisfactory conclusion."

mitted, against objection, to read to the jury copious extracts from medical works, which have not been introduced in evidence and which have not been proved by any witness to be authority, and to state to the jury that what he read is authority upon the subject of poison by arsenic. He is also permitted, against objection, to read to the jury the evidence of one P, a professor of chemistry, given in another case and in another state, and reported in the Criminal Reports. Y is convicted of manslaughter. The question is, whether the rulings of the trial court are prejudicial error.

The ruling of the court in each case is prejudicial error. As regards the medical works it was the duty of the court to instruct the jury that such books are not evidence, but merely theories of medical men. As regards the reported evidence of P. in the Criminal Reports, no opportunity is given the accused to cross-examine the witness, or to meet his evidence.[23]

21. M sues the N. C. R. Mill Co. to recover damages for the loss of a portion of his foot. The question is, whether the trial court errs in refusing to allow the defendant Co. to read in evidence certain extracts from a standard work on mechanics.

The ruling of the trial court is correct.[24]

22. The question is, whether a village map, filed in the recorder's office by the founder, although not required by law to be recorded, and long regarded as a public document, is admissible in evidence.

The map is deemed a public decoment, and admissible in evidence although not required by law to be recorded.[25]

23. W sues the R. L. A., a mutual benefit society, to recover $500, on a certificate issued by the defendant Co. to her husband, conditioned that he should comply with all the

23—Yoe v. The People, 49 Ill. 410.

24—North Chicago Rolling Mill Co. v. Mouka, 107 Ill. 340. See also Conn. Mut. Life Ins. Co. v. Ellis, 89 Ill. 516.

25—St. Louis Public Schools v. Erskine, 31 Mo. 110. See also Whitehouse v. Bickford, 29 N. H. 471.

laws, rules and requirements of the order. The defendant Co. offers in evidence, against objection, a pamphlet containing the rules and by-laws of the society. The question is, whether the pamphlet is admissible.

The pamphlet is admissible. The by-laws of a private corporation, as well as the entries in its books, are not, strictly speaking, records. A record is a written memorial made by a public officer authorized to perform that function, the memorial being intended to serve as evidence of something said or done. But publications of a mutual insurance company, generally circulated among its members, and purporting to contain its rules and by-laws, are admissible as *prima facie* evidence of such rules and by-laws.[26]

26—Knights and Ladies of America v. Ida B. Weber, 101 Ill. App. 488. See also Rudd v. Robinson, 126 N. Y. 113; Marriage v. Lawrence, 3 B. & Ald. 142; Gibbon's Case, 17 How. St. Tr. 810; Terry v. Birmingham Nat. Bank, 93 Ala. 599; Fitch v. Pinckard, 5 Ill. 69; Ryder v. Alton, etc., Ry. Co., 13 Ill. 516.

ILLUSTRATIONS ON ANCIENT DOCUMENTS.

1. A sues B in ejectment. To establish his claim, he offers in evidence, against objection, a deed which is more than fifty years old, but which was not acknowledged as required by the law in force when it was executed. It was, however, in the custody of the grantee and his heirs, who claimed the land under it, and paid taxes thereon, for more than fifty years. The court overrules the objection and allows the deed to be read in evidence as an ancient document. Judgment is given in favor of A. The question is, whether the court's ruling is prejudicial error.

The court's ruling is not prejudicial error. Deeds more than thirty years old are admissible in evidence without proof of execution. It must appear, however, that they are produced from the proper custody so as to raise a reasonable presumption of their authenticity, and facts and circumstances must be proven which will establish the fact that they have been in existence the length of time indicated by their dates. It is not essential, however, that the party claiming under them take actual possession of the land to entitle them to be read in evidence as ancient documents. Payment of taxes on the land for many years is sufficient corroborative evidence.[1]

2. A sues B in ejectment. In support of his claim he offers in evidence an administrator's deed to him, which is more than thirty years old. B objects to the introduction of this deed in evidence on the following grounds: (1) No authority in the administrator to execute it is shown; (2) It is not properly acknowledged; (3) It does not conform to the statute. The question is, whether, assuming that B's grounds are true, his objection should be sustained.

B's objection should be sustained. A deed, though more than thirty years old, is not admissible in evidence as an ancient document if it purports to be executed by one acting in a fiduciary character, unless proof is given of his authority

1—Whitman v. Henneberry, 73 Ill., 109, *contra*, Homer v. Cilley, 16 Me., 29. 14 N. H., 98; Crane v. Marshall,

to make it. A deed insufficient on its face is not admissible in evidence merely because it is an ancient document.[2]

3. A, who sues B to recover a piece of land, offers in evidence, against objection, certain ancient plottings for plans and field notes made by a surveyor, which he obtained from the custody of the surveyor's administrator, to show the location of a disputed private boundary line. The question is, whether the evidence offered is admissible.

The plottings and field notes are inadmissible. They are mere memoranda which may never have been acted upon. They are preparations for a transaction which may never have taken place. But ancient plans and maps are admissible even in a suit between strangers, because "they are of such a character as usually accompany transfers of title or acts of possession, and purport to form a part of actual transactions referring to coexisting subjects by which their truth can be tested, and there is deemed to be a presumption that they are not fabricated."[3]

4. The city of B sues R to recover a strip of land. To establish its claim of adverse user, B offers in evidence, against objection, certain ancient licenses which it had granted to erect and maintain certain fish markets on the land in question. The trial court excludes the licenses on the ground that no acts of possession or enjoyment under them are shown. Judgment is entered for R. The question is, whether the court's ruling is prejudicial error.

The ruling of the trial court is prejudicial error. Acts of possession or enjoyment under the licenses is not essential to their admissibility in evidence.[4]

5. A sues B to recover two parcels of land. The question is, whether certain ancient plans and field notes, made by a surveyor, and which pertain to the land in question, are admissible in evidence as ancient documents.

Ancient plans and field notes are admissible in evidence

2—Fell v. Young, 63 Ill., 106; Boyle v. Graham, 32 Mo., 46.

3—Boston Water Power Co., v. Hanlon, 132 Mass., 483.

4—City of Boston v. Richardson, 105 Mass., 351.

upon the same principles as ancient deeds. They must be produced from the proper custody, and their appearance generally must be consistent with their genuineness. Assuming that the plans and field notes in question conform to these requirements, they are admissible.[5]

6. M sues O to restrain him from trespassing on certain lands which M holds under a lease from the Mayor and Corporation of L. To prove that the Mayor and Corporation of L had authority to make the lease, M offers in evidence, against objection, a certified copy of a bill and answer, filed nearly two hundred years before, and which show that one P had brought suit against the Mayor and Corporation of L, that he had abandoned the litigation and admitted the right of the defendant to the land which is now in question. The certified copy of the bill and answer is objected to on the ground that the facts of that case are *res inter alios acta*. The question is, whether the copy offered should be excluded.

The bill and answer are ancient documents. The doctrine of *res inter alios acta* is not applicable to such instruments. Assuming that the bill and answer are in the proper custody, and are free from suspicion, the certified copy is admissible.[6]

7. M, a vicar, sues B to recover tithes due. B contends that ancient customary payments were made in lieu of tithes, and introduces evidence to prove it. To rebut B's evidence, M, after laying a foundation for the introduction of certain secondary evidence, offers, against objection, an ancient chartulary containing copies of two ordinances to show that the payments made in lieu of tithes were so large that they could not have been made so far back as the time of legal memory. The chartulary is produced from the muniment room of a certain marquis who owned lands which once belonged to the abbey. The question is, whether the chartulary is admissible.

Since the chartulary is an ancient document, produced from

5—Whitman v. Shaw, 166 Mass., 451.

6—Malcomson v. O'Dea *et al.*, 10 H. L. C. 593. (In this case the plaintiff recovered a verdict in the trial court. The Queen's Bench sustained it. The Exchequer Chamber reversed it. The House of Lords finally sustained it.)

the proper custody, and is free from suspicion, it is admissible to prove its contents.[7]

8. B sues D to restrain alleged acts of trespass. To prove ownership, B offers in evidence, against objection, an ancient document, produced from the proper custody, and which purports on its face the exercise of ownership. The question is, whether the document is admissible or not.

The document is admissible. Extrinsic evidence of acts of ownership is not essential to its admissibility. The rule is, "that ancient documents coming out of proper custody and purporting upon the face of them to show exercise of ownership, such as a lease or a license, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership and proof of possession." The courts are not disposed to narrow the bounds of the law of evidence with respect to ancient possession.[8]

9. A sues B in ejectment. To prove his title, A offers in evidence, against objection, two deeds purporting to have been executed in 1832 and 1839, respectively, but which were not acknowledged according to law. He proves, however, that they were recorded in the proper county 29 years before this action was commenced; that they were in possession of the party in possession of the land before A, and remained with him until his death; and that a deed of later date, and dependent upon them, has been on record for forty years. The question is, whether they are admissible as ancient documents.

The preliminary proof is sufficient to render the deeds admissible as ancient documents.[9]

10. In a suit by A against B, A offers in evidence an unproved will as an ancient document. B objects to the will on the ground that it comes from the custody of the testator's widow instead of from the custody of his executor. The question is, whether the will is admissible.

7—Bullen v. Michel, 4 Dow., 297 (A. of L., 1816).

8—Blaudy-Jenkins v. Dunraven, 2 Ch., 121 (1899).

9—Quinn v. Eagleston, 108 Ill., 248.

The will is admissible as an ancient document. It is not essential that the custody from which an ancient document is produced is strictly according to the legal right. It is sufficient if it comes from the place of deposit where, in the ordinary course of things, such a document, if genuine, might reasonably be expected to be found.[10]

11. A fact in issue is, whether A is the only son and heir of B; and the question is, whether an ancient deed, containing a recital that the grantor, A, is the only son and heir of a prior owner, B, is admissible in evidence to prove that fact.

The deed is admissible to prove that fact.[11] Ancient documents are admissible to prove identity of persons, identity of lands,[12] to establish boundaries,[13] to disprove an alleged custom,[14] to establish pedigree.[15] to prove a settlement,[16] to prove sufficiency of power to execute a valid deed,[17] to show the amount of rents,[18] etc., etc.

12. In an action by A against B, A offers in evidence, an ancient mutilated deed. B objects to it owing to the fact of its mutilation. Enough of the deed remains to show that it was executed in conveyance of an estate according to certain articles of agreement already in evidence. The question is, whether the deed is admissible.

The mere fact that the deed is mutilated is not sufficient to exclude it. The mutilation may affect the weight of the evidence, but not its admissibility.[19]

13. In an action by A against B, A offers in evidence as an ancient document a certain will. B objects to it on the ground that it is not 30 years old. The will shows that it was executed 40 years ago, and the evidence shows that the testa-

10—Doe v. Pearce, 2 M. & Rob., 240.

11—Fulkerson v. Holmes, 117 U. S., 398.

12—King v. Sears, 91 Ga., 577.

13—Plaxton v. Dare, 10 B. & C., 17.

14—Anglesey v. Hatherton, 10 M. & W., 238.

15—Doe v. Beynon, L. R. 4 P. & D., 193.

16—Rex v. Long Buckley, 7 East, 45.

17—Deery v. Cray, 5 Wall (U. S.), 805.

18—Roe v. Rawlings, 7 East, 279.

19—*Per* Lord Tindal in Trimlestown v. Kemmis, 9 Cl. & F., 776.

tor died 25 years ago. The question is, whether the will is admissible.

According to the rule which obtains in England, and generally in this country, the will is admissible as an ancient document. According to the rule which has obtained in New York and Pennsylvania the will is inadmissible as an ancient document. In England, and generally in this country, the age of a will is computed from the date of its execution; but in New York and Pennsylvania it has been computed from the date of the testator's death.[20]

14. R filed a bill against B praying for a setting off to him of dower and homestead, for partition, and for an injunction. B offers in evidence a certain deed as an ancient document. R objects to this deed on the ground that when the suit was commenced the deed was less than 30 years old. When R filed his bill the deed was less than 30 years old, but when he offers it in evidence it is more than 30 years old. The question is, whether the deed is admissible in evidence as an ancient document.

The deed is admissible as an ancient document.[21] The rule is, that documents which are more than 30 years old at the date they are offered in evidence are "ancient," although less than thirty years old at the date of the commencement of the suit.[22]

20—Doe v. Wolley, 8 B. & C,. 22. In this case Lord Tenterden says: "The rule of computing thirty years from the date of a deed is equally applicable to a will." Staring v. Bowen, 6 Barb. (N. Y.), 109; Shaller v. Brand, 6 Binn. (Pa.), 439.

21—Reuter v. Stuckart, 181 Ill., 529.

22—Gardner v. Granniss, 57 Ga., 539; Bass v. Sevier, 58 Tex,. 567; 1 Am. & Eng. Ency. of Law, 565, note 1.

ILLUSTRATIONS ON DECLARATIONS AGAINST INTEREST BY PERSONS SINCE DECEASED.

1. H sues M to recover damages for the destruction of his buildings by a fire alleged to have been caused by the negligence of M. M contends that H's buildings were destroyed owing to the negligence of H's servant S, who was in charge of H's sausage room at the time of the fire. To prove his contention, M offers in evidence a declaration by S, made shortly after the fire, to one L, that when the alarm was given of the mill fire he left the lard kettle boiling and went out to see the mill fire; and that, when he returned, the lard kettle had boiled over and set the room and building on fire. S is now dead. H objects to this evidence as incompetent, irrelevant, immaterial and hearsay. The question is, whether it is admissible.

The declaration is admissible. "Confessedly the evidence was hearsay, but it falls within a necessary and established exception to the general rule excluding hearsay evidence. The exception is this: Declarations, whether verbal or written, made by a deceased person, as to facts presumably within his knowledge, if relevant to the matter of inquiry, are admissible in evidence as between third parties, when it appears that: (a) The declarant is dead; (b) the declaration was against his pecuniary interest; (c) the declaration was of a fact in relation to a matter of which he was personally cognizant; (d) the declarant had no probable motive to falsify the fact declared." It is not essential that the declaration was made *ante litem motam.* The true test is, "whether they were made under circumstances justifying the conclusion that there was no probable motive to falsify the facts declared. The existence or nonexistence of a controversy at the time a declaration was made might be a material circumstance to enable the court to determine whether there was any probable motive for the declarant to falsify as to the facts declared. Whether the fact that the declaration was made after a con-

troversy arose would tend to show such motive would depend upon the character and facts of each particular case."[1]

2. B sues T in replevin to recover possession of a colt upon which he holds a chattel mortgage. T denies that B is entitled to possession of the colt. The facts are, T sold to one D a mare then with foal, reserving the foal, and allowing D $25 to raise it. A few weeks later the colt was born, and D raised it. When it was six weeks old D told T, in the presence of two witnesses, "I would not give you $5 for your colt." Two months later D told a Mrs. T that he did not own the colt; that T had reserved it when he sold him the mare. When the colt was six months old D gave B a chattel mortgage on the colt to secure a debt. D is now dead. The question is, whether the declarations made by D to T and Mrs. T are admissible in evidence.

The declarations are admissible as declarations against interest by a person since deceased. They are clearly within all the conditions requisite for the reception of such evidence: (1) The declarant was dead; (2) The declarations were against the pecuniary interest of the declarant at the time they were made; (3) The declarations were concerning a fact of which the declarant was immediately and personally cognizant; and (4) The declarations were made, not only *ante litem motam*, but also before the chattel mortgage was executed, and when there was no motive on the part of D to falsify.[2]

3. H seeks to reverse a recovery suffered by one F of certain lands. The issue is, "Whether Wm. Fowden (F)——— was an infant within the age of 21 years, to wit, of the age of 20 years and no more." The question is, whether an entry, by one H, the man-midwife who attended at F's birth, and who is now dead, charging for his services and marked "paid," is admissible to prove the date of F's birth.

The entry is admissible as a declaration against interest by a person since deceased. The fact that part of the entry is self-serving does not exclude it. The disserving part would

1—Halvorsen v. Moon & Kerr Lumber Co., 87 Minn., 18 (1902).

2—Baker v. Taylor, 54 Minn. 71.

be meaningless standing alone; and the entry taken as a whole shows no probable motive to falsify the fact declared. Nor does the fact that the declarant is not identified in interest with a party to the suit exclude it. Identity of interest in the subject matter of the suit is essential to the admissibility of admissions; but this rule is not applicable to declarations against interest by a person since deceased.[3]

4. A seeks to have the probate of E's will set aside on the ground that E was mentally incapable of making a will. The question is, whether a declaration by B, the only beneficiary under the will, made on the morning the will was executed, that E was "just alive and that is all," is admissible against B.

The declaration is admissible, since B is the only beneficiary interested in sustaining the will.[4]

5. The town of M sues A, a surety on a bond given by B, a deceased collector of taxes, for the faithful performance of his duties. The question is, whether entries, made by B in a private book kept for his own convenience, stating that certain amounts had been paid to him by certain persons as taxes, are admissible in evidence against A.

The entries were aganist B's pecuniary interest, and he is now dead. At the time they were made the relation of principal and surety between B and A still existed. It follows, therefore, that they are admissible in evidence against A.[5]

6. The county of M sues I, the executor of one S, deceased, and the sureties on S's official bond as treasurer. The question is, whether oral declarations by S, made by him while the bond was still in force, that he was behind with the county of M $2,000, are admissible in evidence against I and the sureties.

3—Higham v. Ridgway, 10 East. 109.

4—Egbers v. Egbers, 177 Ill. 82.

5—Middleton v. Melton, 10 B. & C. 317 (a leading English case). See also, the important case of City of Chicago v. Gage *et al.*, 95 Ill., 593, in which case a verdict was given against the defendants for $1,000,000 debt, the penalty of the bond, and upwards of $500,000 damages, upon which judgment was rendered. This judgment was reversed by the Appellate Court, but sustained by the Supreme Court.

The declarations by S are admissible. The fact that they were made orally does not exclude them.[6] It has been held, however, that oral declarations against interest are inadmissible. Thus, the editors of Phillipps on Evidence say, "We believe not one (case) has gone the length of saying that the oral declaration of a person, however much it may militate against his interest, shall be received merely upon the ground that he is dead."[7] And Chief Justice Shaw says, in an early Massachusetts case,[8] "It is argued that the evidence was within another exception to the rule respecting hearsay, viz., being an admission against his interest at the time. Higham v. Ridgway, 10 East, 109. But we think this has been confined wholly to cases of entries made in books, &c., by a person deceased, in relation to a matter contrary to his interest at the time." The same view was held in another Massachusetts case.[9] The ground assigned for this view is "looseness and uncertainty of mere verbal statements" as compared with "clearness and certainty of written memoranda." According to the modern view, however, the fact that the declarations are oral instead of written may affect their weight, but not their admissibility.[10]

6—The County of Mahaska v. Ingalls, 16 Ia. 81.

7—3 Phillipps on Evid., Cowen & Hill's Notes, 260.

8—Lawrence v. Kimball, 1 Metc. (Mass.) 524.

9—Framingham, D. C., Co. v. Barnard, 2 Pick. 532.

10—Bartlett v. Patton, 33 W. Va. 72; Furdson v. Clogg, 10 M. & W. 572; Marcy v. Stone, 8 Cush. (Mass.) 4; Reg. v. Overseers of Birmingham, 1 Best & S. 763. In the last case cited, Blackburn J. says, "Lastly, is there any distinction in this respect between a written entry and an entry proved by parol? I can see a great difference between them in weight, for a parol statement has in many cases no weight at all. But when the fact of a parol statement having been made is satisfactorily proved, I cannot see any distinction, as regards admissibility, between it and a written one, and no such distinction is taken in the cases." In the case of the County of Mahaska v. Ingalls, 16 Ia. 81, cited in note 6, Dillon J., after a careful examination of the authorities, says, "In the case at bar the declarations were verbal, and the question yet remains to be considered whether verbal admissions stand upon the same footing as written ones. Aside from the superior

7. A, B and C are joint and several makers of a promissory note. A, who paid the holder of the note the whole of the debt and interest, sues B as cosurety for contribution, and C as principal for the whole amount paid the holder. To show that C is the principal debtor, A offers in evidence, against objection, an indorsement on the note by the payee (since deceased), acknowledging the payment by A of £280, on account of the £300, "the £300 having originally been advanced to Evan Humphreys" (C). The question is, whether the indorsement is admissible to prove the collateral fact embodied in the statement within the quotation marks.

The indorsement as a whole was against the interest of the declarant, who is now dead. The part within the quotation marks is connected with the part against the declarant's interest, and is not self-serving. It is therefore admissible to prove the collateral fact that C was the principal debtor on the note."[11]

weight and value due to declarations reduced to writing, we did not suppose any distinction could be justly drawn in principle between these and oral or parol declarations. . . . . From the unbroken current of English and the decided preponderance of American authority, we think the present (1864) state of the law is, that verbal declarations are receivable, when accompanied by the following prerequisites: 1st. The declarant must be dead. To this we believe the English cases make no exception. . . . . 2nd. The next prerequisite is, that the declaration must have been against the interest of the declarant at the time, and that interest must be a pecuniary one. . . . . 3rd. The declaration must be of a fact or facts in relation to a matter concerning which the declarant was immediately and personally cognizable. . . . . 4th. In addition, the court should, upon the circumstances of the particular case, be satisfied that there was no probable motive to falsify the fact declared; as where the declaration is made *ante litem motam*, or at a period so remote as to preclude all suspicion that it was manufactured for the occasion."

In the same case, Dillon, J., after citing and commenting upon a few cases which reject oral declarations against interest by persons since deceased, says: "In consequence of these statements, so deservedly entitled, from their source, to great weight and credit, we have been led to explore this question to its foundation, and are constrained to the conclusion that the cases do not establish any distinction in this regard, in principle, between oral and written admissions."

11—Davies v. Humphreys, 6 M. & W. 153.

8. K appeals against an order of the court for the removal of one D, a female pauper, from the parish of B to the parish of K. Evidence is introduced which shows that the father of the pauper's husband had occupied and paid rent for a tenement in the parish of K. To prove the amount of the rent paid, evidence is offered by the respondent, against objection, that the father of the pauper's husband, while occupying the tenement, and who is now dead, told his son that he (the father) occupied the same as tenant at a rental of £20 per year. The question is, whether the evidence is admissible.

The evidence is admissible to prove the collateral fact, the amount of the rent paid. Possession of the tenement raised a presumption of ownership in fee. Hence the statement by the father, that he occupied the premises as tenant, was against his proprietary interest. And since he is now dead, the statement is admissible as a declaration against interest by a person since deceased, not only to prove the adverse interest, but also the collateral fact connected with it that the amount of the rent was £20 per year. The fact that the declaration was made orally is immaterial, as regards the admissibility of the declaration.[12]

9. S sues B for money lent, money paid, work done, and on accounts stated. To prove certain alleged transactions between S and B, S offers in evidence, against objection, a letter, written by S's confidential clerk, who managed a branch business, stating that B had sent three cases to the office, and giving details of the transactions connected therewith. The clerk is now dead. The question is, whether the letter is admissible in evidence as a declaration against interest by a person since deceased.

The letter was not against the pecuniary or proprietary interest of the clerk, and therefore it is inadmissible. It was merely an ordinary business report from an agent to his principal concerning the business in which he was engaged. The adverse interest "amounts to no more than an admission that he (the clerk) has the care of the three chests which have

12—The Queen v. The Parish 763 (Q. B. D.); The Baron of Birmingham, 1 Best & Sm. Bode's Case, 8 Q. B. D. 208, 244

arrived at the office, and the possibility that this statement might make him liable in the case of their being lost is an interest of too remote a nature to make the statement admissible in evidence."[13]

10. A sues B and C as partners. C dies and A sues B alone as surviving partner. B denies that he was C's partner, and to prove it he offers in evidence, against objection, declarations made by C to the effect that he was not a partner of B. At the time C's declarations were made, the business, in which A claims that B and C were partners, was insolvent. The question is, whether C's declarations are admissible.

The fact that the business, in which A claims that B and C were partners, was insolvent when C's declarations were made, renders the declarations admissible. "This fact, it must be noticed, is of vital importance, as affecting the question of interest. In the absence of the fact of insolvency, it is manifest that the converse proposition that Humes (B) was a partner of the declarant would be a declaration against his interest. This is so because, if true, it would entitle Humes (B) to a half interest in the partnership assets. . . . . The assertion, therefore, that Humes (B) was not a partner, having been made at a time when the partnership business had failed, it was a declaration exonerating him from a pecuniary liability for the partnership debts, and, if true, to this extent doubled the ultimate amount of Glover's (C's) liability."[14]

11. A, who owned community property with his wife, died, leaving besides his widow a child who claims to have been adopted by him. Subsequently the widow died leaving a will in which she recognized the child as an heir of A, and stated that the child was an adopted daughter. The child now sues the devisees who claim under the widow's will. The question is, whether the declaration in the will, that the child was an adopted daughter, is admissible to prove the fact of such adoption.

The declaration was against the widow's interest, and for

13—Smith v. Blakey, L. R. 2 Q. B. D. 326.

14—Humes v. O'Bryan, 74 Ala. 64.

this reason admissible in evidence, and, in the absence of other evidence sufficient to establish the fact of the adoption.[15]

12. A, B and C, as some of the children and heirs at law of T, deceased, sue for partition of the real estate of which T died seized. The defendants claim that T, in his lifetime, made advancements to A, B and C of $1,000 each. The plaintiffs admit receiving from T $1,000 each, but aver that the amount received was a gift and not an advancement. To prove this, they offer in evidence, against objection, declarations made subsequently by T to the effect that the amount received by A, B and C was an absolute gift to each of them and not an advancement. The question is, whether T's declarations are admissible.

Upon this question, the decisions are in hopeless conflict. In a recent Iowa case,[16] the court hold that subsequent declarations of the donor, not a part of the *res gestae*, are inadmissible to show that a conveyance to a son is a gift rather than an advancement. In a recent Missouri case[17] the court hold the contrary. In the latter case, MacFarlane, J., speaking for the court, says: "The presumption is that a parent intends that his children shall share equally in his estate. Hence the further presumption that when he gives property to one of his children, in his lifetime, he intends the same as an advancement to such child with which he is to be charged on final distribution of his estate. Therefore, though the donor parts with all his interest in the property given, he still has an interest in having it charged as an advancement in order that all his heirs may be made equal out of the property remaining at his death. It is therefore to his interest that the donation should be charged as an advancement, and any subsequent admissions of the donor to third persons that it was intended as an absolute gift would be made against his interest and would be admissible, not for the purpose of changing the character of the transaction, or of impeaching the title of the grantee, but of rebutting the

15—White v. Holman, 25 Tex. Civ. App. 152; Govin v. De Miranda, 140 N. Y. 474.

16—Ellis v. Newell, 120 Ia. 171 (1903).

17—Gunn v. Thruston, 130 Mo. 339, 347 (1895).

presumption that it was intended as an advancement." In an earlier Missouri case,[18] Black, J., speaking for the court upon this point, says: "Where a conveyance has been made by the father to a child, the father's subsequent declarations may be received to show that the conveyance was not an advancement, but an out and out gift." In the same case he says: "Verbal declarations by a parent to third persons that he had advanced the child are incompetent when offered in the interest of the estate."

13. T files a bill for partition. The pleadings present the question for decision whether some of the heirs of the decedent had not received property from him as an advancement. Declarations by the decedent, made several years after he made conveyances to some of his children, to the effect that the property was made over to the respective recipients as an absolute gift, and not as an advancement, are offered in evidence, against objection, on behalf of the recipients. The question is, whether the declarations are admissible.

As stated in the answer to the next preceding question, the decisions upon this question are in hopeless conflict. In Indiana, as well as in Iowa and some other states, such declarations are held inadmissible. In an Indiana case, decided in 1892, Elliott, J., speaking for the court, says: "Nor do we think they are competent upon the ground that they were declarations against the interest of the party by whom they were made, inasmuch as so far as his interest was concerned it was immaterial whether the transfer of the money and property was by way of gift or advancement."[19]

14. G, who holds judgments against B, since deceased, files a bill against B's widow to set aside a conveyance made to her by B. The defendant claims that her husband, B, had purchased the land with her money and had held the title as trustee. To prove this, she offers in evidence, against objection, a written declaration made by B before his indebtedness to G was incurred, to the effect that he had used his wife's

18—Nelson v. Nelson, 90 Mo. 463.

19—Thistlewaite *et al.* v. Thistlewaite *et al.*, 132 Ind. 355.

money in purchasing the property and that he held the title in trust for her. The question is, whether the declaration is admissible.

Since the declaration was against B's proprietary interest, and he is now dead, the declaration is admissible.[20]

15. W sues D on his promissory note. D pleads no consideration. The note was executed by D in renewal of two other notes executed by D to W's father, which were found in W's possession, but not indorsed to him. D contends that these notes were the property of W's father, and therefore the note sued upon was without consideration. W contends that the two notes, in renewal of which the note sued upon was executed, had been given to him by his father, in a distribution among his children of the notes held by his father. To prove this, W offers in evidence, against objection, declarations made by W's father to third persons, to the effect that he had made a gift to W of the two notes, in consideration of which the note sued upon was executed. W's father is now dead. The question is, whether the declarations are admissible.

The declarations are admissible. They "were against the interests of Thomas Wilkerson (W's father), and related to a fact about which he possessed competent knowledge. This constitutes one of the exceptions to the general rule upon the subject of hearsay evidence."[21]

16. W and T made an agreement whereby W purported to relinquish all claim to a certain legacy in consideration of T releasing him from all liability to refund £2,000 advanced to him by the testator, T's brother. W subsequently refused to perform the agreement, and T sues him to enforce its per-

20—The German Insurance Co. *et al.* v. Bartlett *et al*, 188 Ill. 165.

21—Dean v. Wilkerson, 126 Ind. 338. "The *ground* upon which this evidence is received, is the *extreme improbability of its falsehood.* The regard which men usually pay to their own interests is deemed a sufficient security, both that the declarations were not made under any mistake of fact, or want of information on the part of the declarant, if he had the requisite means of knowledge, and that the matter declared is true." 1 Greenleaf on Evid., §148.

formance. T is the testator's residuary legatee. W contends that the £2,000 advanced to him by the testator was a gift in the nature of a marriage portion to his wife, the adopted daughter of the testator. T contends that it was a loan. To prove that it was a loan, T offers in evidence an entry in the testator's private account book as follows: J. Witham paid me three months' interest. . . . £20," giving the date. The question is, whether this entry is admissible.

The entry is admissible. It is prima facie against the declarant's interest, and, upon this point, that is sufficient. The fact that a collateral and ultimate object for which it is used is exactly the opposite does not affect the admissibility of the declaration. The ultimate fact which the entry shows is, that the advancement made was a loan and not a gift. As regards this ultimate fact, the entry is in the declarant's favor, but this concerns the weight of the declaration and not its admissibility.[22]

22—Taylor v. Witham, 3 Chi. Div. 605. This is a very important case. In the opinion, Jessel, M. R., says: "This question is one of very great importance, not merely in this particular instance, but in many other cases. The real question is, under what circumstances the entry made by a dead man in his books ought to be received in evidence. It is no doubt, an established rule in the courts of this country that an entry against the interest of the man who made it is receivable in evidence after his death for all purposes. What is the meaning of being against his interest? . . . . it must be *prima facie* against his interest, that is to say, the natural meaning of the entry standing alone must be against the interest of the man who made it. Of course, if you can prove *aliunde* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question of value. The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it, and that though apparently against his interest, yet really it was for it; but that is a matter for subsequent consideration when you estimate the value of the testimony. . . . . In this particular case, therefore, the real value of the entry is as evidence that there was a debt. But that is a collateral circumstance; if I at once admit the entry as being naturally and *prima facie* against interest, I should say the use which has been made of it is quite immaterial; that is according to all the authorities."

17. The question is, whether an indorsement on a promissory note, made by the original payee who has since died, and acknowledging a payment of interest on the note after the statute of limitations had begun to run against it, is admissible in evidence as a declaration against interest by a person since deceased.

The indorsement is *prima facie* against the pecuniary interest of the declarant; but since its effect is to remove the ban of the statute, it is upon the whole in the declarant's favor. Therefore, in the absence of other evidence, it is inadmissible.[23]

23—Libby v. Brown, 78 Me. 492; Roseboom v. Billington, 17 Johns. (N. Y.) 182; Beatty v. Clement, 12 La. Ann. 82; Chamberlain v. Chamberlain, 116 Ill. 480.

ILLUSTRATIONS ON ACCOUNT-BOOK ENTRIES.

1. A obtained a judgment against B. B took an appeal on the ground that certain account-books were admitted, against objection, which were not books of original entry. The facts show that the entries were originally made on a slate by C, who was A's foreman; that once a month C would take the slate to A, who would take it home in the evening, copy the entries on the slate into his book and return the slate to C the next morning. The question is, whether A's account-books were properly admitted.

According to some decisions, including those of Illinois, the books were properly admitted. Where charges are made, in the first instance, upon a slate, and within a reasonable time thereafter transferred by the proprietor or his clerk, and these carefully compared with the entries on the slate, so as to make certain they were correctly copied into the books, the books, on proof of these facts, will be admissible in evidence in behalf of the proprietor,—the minutes upon the slate being regarded as mere memoranda to aid the memory until the items should be transferred to the books. To admit charges on party's books, transferred from minutes originally made upon a slate, as evidence as to the items therein shown, it is sufficient if the entries were transferred within a reasonable time, so that it may appear to have taken place while the memory of the facts was recent, or the source from which a knowledge of the matters was derived was unimpaired, and it is shown the entries on the slate were made when the goods were delivered.[1]

1—Redlich v. Bauerlee, 98 Ill., 134.

The Illinois statute relating to account-book entries, passed in 1867, provides as follows: "Where in any civil action, suit or proceeding, the claim or defense is founded on a book account, any party or interested person may testify to his account book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non-resident of the state at the time of the trial, and were made by such deceased or non-

2. A, as the personal representative of B, deceased, sues C, B's son, in assumpsit. A offers in evidence, against objection, entries made by D, another of B's sons, at the request and under the directions of B. The entries comprise statements of certain personal property which each of several of B's children had received from him. At the time the entries were made B said that he wanted these matters put down so that all of his children might share equally in his estate. The question is, whether the entries are admissible.

The entries are inadmissible because they were not made in the usual course of business. They are mere memoranda of advancements made by B.[2]

3. A sues B for services rendered. B, after testifying to the correctness of the entries in his day-books, of the various items of his account against A, is permitted to put his day-books in evidence. He then offers, against objection, to put in evidence his ledger, which he testifies is a correct transcript of his day-books, but the court sustains the objection, and judgment is entered for A. The question is, whether the court's ruling is prejudicial error.

The court's ruling is not prejudicial error. When a party's day-books are admitted in evidence, after he has testified to the correctness of the various entries therein, there is no error in refusing to allow him to give in evidence his ledger, which he testifies is a correct transcript of his day-books.[3] The ledger is not a book of original entries.

4. A sues B in assumpsit for services rendered. To show the services rendered, and the amount due him, A offers in evidence, against objection, B's account-books. The entries in the account-books were made the day after the work was done, from time-slips made by the workmen and marked "approved" by the foremen who testify to their correctness, and the men who made the entries on the books testify that the

resident person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account book and entries shall be admitted as evidence in the cause." L. 1867, p. 184, § 3; Hurd's Revised Statutes (1903) Chap. 51, § 3.

2—Treadway v. Treadway, 5 Ill., App., 478.

3—Stickle v. Otto, 86 Ill., 161.

slips wre correctly copied. The question is, whether the account-books are admissible.

Since the entries are fully verified the account-books are admissible to prove them.[4]

5. A sues the B Ins. Co. on his policy to recover the value of goods destroyed by fire. He proves that a correct inventory of the goods was taken at a certain date; that the inventory was reduced to writing in an inventory book; that the footings were correctly copied upon the fly-leaf of an exhausted ledger, and afterwards transferred to the fly-leaf of a new ledger; that the inventory and exhausted ledger had been destroyed and that none of the witnesses could remember the amount of the inventory or footings. The question is whether the entry of the footings on the fly-leaf of the new ledger is competent evidence in connection with the oral testimony.

The entry, under the circumstances stated, is competent evidence.[5]

6. In an action on the case, A sues B to recover from him, as bailee, the value of a package of jewelry sent to B's hotel to be delivered to A's traveling agent. To prove the different articles, prices, etc., he offers in evidence a copy of an original memorandum-book kept by him. The question is, whether the copy of the memorandum-book is admissible.

The copy is inadmissible. Even the original memorandum-book would be inadmissible. This is owing to the fact that, since this action is for a tort the matter sought to be proved is collateral to the issue of debt and credit between the parties; in which case account-book entries are inadmissible.[6]

7. A sues B for goods sold and delivered to him. A offers in evidence the book of original entries kept by his intestate, together with his own oath and that of the intestate's clerk. B objects to its admissibility on the ground that no measure, weight or quantity is given in connection with the several

4—Chisholm v. Beaman Machine Co., 160 Ill., 101.

5—Ins. Co. v. Weides, 14 Wall. (U. S.), 375. The decision in this case, upon the point raised, is approved in C. & A. R. R. Co. v. Strawboard Co., 190 Ill., 268.

6—Palmer v. Goldsmith, 15 Ill. App., 544.

items charged. The question is, whether the entries are admissible.

The entries are admissible. The omissions stated may affect the weight of the entries but not their admissibility.[7]

8. In the settlement of the estate of a decedent, Dr. M, one of the claimants, seeks to put in evidence account-book entries contained in a separate book, charging the decedent for professional services. The question is, whether the entries are admissible.

The entries are inadmissible. A book which shows on its face that it was not one of entries in the regular course of business, but was a separate book containing no charges except against the defendant is not admissible as a book of original entries. The regularity of the account as to its place in the ordinary books of the business is as necessary as its regularity in other respects, and the book, failing in that requirement, must be rejected altogether.[8]

9. A sues B in assumpsit. To prove his claim, he offers in evidence, against objection, his account-books. The only evidence given in support of the books is that of A's bookkeeper, who merely transcribed the entries from slips handed him by salesmen, and who had no personal knowledge of the sale and delivery of the goods charged. The question is, whether the account-books are admissible.

The account-books are inadmissible. It is sometimes proper to admit books of account as evidence of the acts of those who kept them, where the entries were contemporaneous with the acts recorded; but where the book is, as in this case, the record of the acts of others, not within the personal knowledge of the bookkeeper, but made up from the statements of others, such book is hearsay. From the earliest cases, the admission of entries by third persons has proceeded upon the theory that such persons had personal knowledge of the fact stated in the

7—Pratt v. White, 132 Mass., 477.

8—*In re* Fulton's Estate, 178 Pa. St., 78. In some jurisdictions account-books of professional persons are held admissible. Upon principle, they should be put upon the same plane as the account-books of persons engaged in commercial pursuits, and the tendency is to do so.

entry. To render the books admissible, further proof is essential.[9]

10. A sues B in assumpsit to recover $2,500 loaned him. To prove his claim, A offers in evidence, against objection, an old account-book in which B was debited with this twenty-five hundred dollars. The question is, whether the entry is admissible.

The entry is inadmissible. An account-book to be used as evidence should be one containing an entry of transactions in the store, factory or office, as they occurred in the regular course of business. Where it is an old book, laid aside as a book of accounts, and used only for one entry of a late transaction, it is not admissible to prove such entry. It has never been held that a single entry makes an account-book, nor has it ever been held that a single entry of cash in a book is competent proof.[10]

11. A, a blacksmith, sues B in assumpsit for work and labor. According to his habit, A had entered the charges on a slate and subsequently transcribed them in ledger form into an account-book, after which the entries on the slate were rubbed out. He now offers the account-book in evidence and B objects to it on the ground that it is not a book of original entries. The question is, whether the book is admissible.

The account-book is admissible. The entries on the slate were merely memoranda for temporary use.[11]

12. A, a merchant, sues B in assumpsit for goods sold and delivered. He offers in evidence, against objection, his account-books of original entries kept by his clerk. The clerk testifies to the correctness of the books. The question is, whether the books are admissible.

The books are clearly admissible. It is well settled in this country that entries made by a clerk, in the regular and usual

9—Swan v. Thurman, 112 Mich., 416. See also an exhaustive discussion of the subject in a note to Price v. Earl of Torrington, 1 Smith's Lead. Cases, 344; and also, Stettaner v. White, 98 Ill., 72.

10—Kibbe v. Bancroft, 77 Ill., 18.

11—Faxon v. Hollis, 13 Mass., 427 (1816).

course of business, are admissible in evidence after his death on proof of his handwriting: *and during his life, if authenticated by him.* Such entries form part of the *res gestae,* and are admissible as original evidence.[12]

13. A sues B for goods sold and delivered. He offers in evidence, against objection, account-books of original entries kept by himself. The question is whether the books are admissible.

The account-books are admissible. Books of original entries, kept by the party himself, are admissible upon proof being made that some of the articles were delivered at or about the time the entries purport to have been made; that the entries are in the handwriting of the party producing the books; that he kept no clerk at the time; and that persons having dealings with him had settled by the books, and found them to be fair and correct.[13]

14. A sues the B Ry. Co. for damages for burning stacks of straw. To show the quantity of straw destroyed, A offers in evidence, against objection, eighteen instruments of writing called "stack sheets." These sheets were prepared from scale tickets on which the weight of each load of straw was entered when it was received. The scale tickets were not preserved. The persons who weighed the straw and made the scale tickets and stack sheets testify that the weights were correctly set down on the scale tickets, and correctly transcribed to the stack sheets in each instance. The question is, whether the stack sheets are admissible.

The stack sheets are admissible as original documents.[14]

15. A sues B in assumpsit for meat sold and delivered. He offers in evidence his account-books, and testifies that they were kept in the conduct of his business; points out in them many items of meat charged to B, which are in A's handwriting; testifies that the entries were made by him at the time the goods were sold and delivered to B; that they are just and

12—Humphreys v. Spear, 15 Ill., 275.

13—Boyer v. Sweet, 3 Scam. (Ill.), 120; Ruggles v. Gatton, 50 Ill., 412; Kibbe v. Bancroft, 77 Ill., 18.

14—C. & A. R. R. Co. v. Strawboard Co., 190 Ill., 268.

correct; that they are original entries. B objects to the books on the ground of their delapidated condition. Originally, the books had only paper covers, and the entries are mostly in pencil. They are shop-worn, have been used in several law suits, the outside covers, some outside leaves, and a few interior leaves, are gone. A offers to produce his ledgers, posted from them, to show any credits that might have been on the lost sheets. The question is, whether the books are admissible.

The books are admissible. The possible loss of credits to B under the circumstances stated is not a sufficient reason for rejecting them, but only a matter affecting their weight.[15] It has been held, however, that the mutilation of books of original entry, by the party in whose custody they were, is such a suspicious circumstance as to destroy whatever credit might otherwise be attached to the ledger in connection therewith.[16] Wharton says: "The book on its face must be regular. Mutilated memoranda can not constitute a book of original entries. The entry must be complete in itself. Sheets of paper however, on which separate entries have been made, have been received. The entries must be fair and free from suspicious alterations."[17]

15—Weigle v. Brantigam, 74 Ill. App., 285. App., 303; same case, 136 Ill., 586.

16—Deimel v. Brown, 35 Ill.

17—1 Wharton on Evid., § 684.

ILLUSTRATIONS ON DECLARATIONS MADE IN THE REGULAR COURSE OF BUSINESS.

1. A sues B to recover for the support of a pauper. A material fact in issue is the date when one L had his leg broken. To show this fact, entries made in the regular course of business, in the books of the physician, since deceased, who set the fracture, are offered in evidence against objection. The breaking of the limb and the services of the physician are established by extrinsic evidence. The question is, whether the entries are admissible.

The entries are admissible. They were made in the regular course of business by a party since deceased.[1]

2. A sues B for money had and received. An important fact in issue is, whether A committed an act of bankruptcy, the answer to which hinges upon the *place* where A was arrested. To prove the place of A's arrest, the return of the officer, since deceased, who made the arrest, is offered in evidence. The question is, whether the return is admissible.

Since the officer was under no duty to state in the return the place where the arrest occurred, the entry, according to the English rule, is inadmissible.[2]

3. A sues B in ejectment. An important fact in issue is, whether B had been served with notice to quit. To prove that he had, one of the duplicate notices to quit, indorsed by a member of the firm of attorneys whose duty it was to have the notice served, is offered in evidence. The attorney who indorsed the notice is now dead. The evidence shows that the duty of serving notices to quit rested upon the clerks. The question is, whether the attorney's indorsement of service of the notice is admissible.

The indorsement, even according to the English rule, is admissible. The attorney owed to his client the duty of having

1—Augusta v. Windsor, 19 Me., 317.

2—Chambers v. Bernasconi, 1 C. & J., 451.

the notice served. The fact that it was performed by himself instead of by one of his clerks is immaterial.[3]

4. A sues B as indorser of a bill of exchange. To show demand and dishonor, A offers in evidence an entry made in the regular course of business by the notary's clerk, since deceased, in a book kept by the clerk who presented the bill. The question is, whether the entry is admissible.

The entry is admissible as one made in the regular course of business.[4]

5. A sues B for beer delivered to him by A's drayman, D, who is now dead. It was customary for D to report every evening to A's clerk, C, the deliveries made, when C would enter them in a book kept for that purpose, and both C and D would sign them. C is still living. To prove the delivery to B, A offers in evidence the entry against B. The question is, whether the entry is admissible.

The entry is admissible. The fact that it was signed by C, who is still living, is immaterial. It was subscribed by D, and he is now dead.[5]

6. A, a dealer in lumber, sues B, his agent, for the conversion of certain funds. To show that B had failed to enter in his cash book all moneys received by him from sales, A calls L as a witness who testifies that he made on a loose sheet of paper memoranda of the sales for eighteen days, and gave the memoranda to A. A thereupon testifies that he copied the memoranda into a book, which he produces, but says that the origi-

3—Doe d. Patteshall v. Turford, 3 B. & Ad., 890. See also Reg. v. Inhabitants of Worth, 4 Adol. & E., 132, in which an entry made by an employer in which he regularly kept minutes of his contracts with his employees was offered and rejected. In this case Lord Denman says: "In a case of this kind the entry must be against the interest of the party who writes it, or made in the discharge of some duty for which he is responsible." Again, in Massey v. Allen, L. R., 13 Ch. Div., 558, 562, an entry by a broker in a daybook of his transactions with a firm was excluded on the same ground. In this country, however, the rule is more liberal.

4—Poole v. Dicas, 1 Bing. (N. C.), 649.

5—Price v. The Earl of Torrington, 2 Lord Raymond, 873.

nal memoranda are lost. The question is, whether the entries contained in the book are admissible.

It has been held that such entries are inadmissible.[6] The reason assigned is, the memoranda from which the entries were copied were only private matter not made in the regular course of business. Other courts hold that, since the entrant and the persons who made the reports to him testify in the case, no question of a hearsay exception arises: and the entries should be held admissible on the principle of using past recollection. Upon this point, see quotation, in note 7 below, from Professor Wigmore's editorial insertion in Greenleaf on Evid. See also his editorial insertion in Greenleaf on Evid., 16th edit., Vol. 1, § 439b.

7. A sues B for an alleged breach of contract. Owing to the alleged breach, A had the work done by other parties. To show the number of days' work performed, and the quantity of material used, A offers in evidence, against objection, a time-book kept by one W, the foreman. The entries in the time-book were made by W, based upon oral reports made to him by gang foremen who had personal knowledge of the work done and the materials furnished. W testifies that the entries accord with the reports furnished him by the gang foremen, and the latter testify that the reports given by them to W were correct. The question is whether the entries are admissible.

The entries are admissible. Since both parties to the transactions testify to them, no question of a hearsay exception arises. The combined testimony of the two parties should suffice to admit the entries upon the principle of using past recollection.[7]

6—Peck v. Valentine.

7—Mayor v. Second Ave. Ry. Co., 102 N. Y., 572. In distinguishing this case from the one in question 6, the New York court hold that in this case the reports were made to the entrant in the regular course of business, whereas in the other they were not. See also, to the same effect, Chaffee v. U. S., 18 Wall., 540, 541. In this case Justice Field, speaking for the court, says: "The books were not public records; they stood on the same footing with the books of the trader or the merchant. . . . Their admissibility must, therefore, be determined by the rule which gov-

8. A sues B and C, two sisters, for money borrowed. B pleads insolvency and C infancy. To show that C was of age when the money was borrowed, A offers in evidence, against objection, a book which is admitted to be the church record

erns the admissibility of entries made by private parties in the ordinary course of business. And that rule, with some exceptions, not including the present case, requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible."

Upon this subject, Professor Wigmore, in an editorial insertion in Greenleaf on Evidence, 16th edit., Vol. 1, p. 206, says: "The difficult situation arises, in the application of this part of the principle, where two persons have co-operated in the entry, one having personal knowledge and reporting to the other, and the other writing down the transaction thus reported; the typical cases being that of a salesman and entry-clerk or bookkeeper and that of a workman and a foreman recording the work reported. Where both such persons are brought to the stand, no question of a hearsay exception arises; and it will be seen later that, upon the principle of using a past recollection, the combined testimony of the two should suffice to admit the entry. But where one of them—usually the salesman, workman, or other person having personal knowledge—does not appear as a witness, the entry can be received, if at all, only under the present exception. That it should be so receivable seems proper, on principle, as well as for reasons of practical convenience; for (apart from the English doctrine admitting oral reports) if the salesman, etc., has made a regular report in the course of business, which has not taken written shape, it seems not to be essential whether it is he or another who gives it that written shape, and accordingly an entry, verified by the person making it, of a regular report by a person not now available would seem admissible. The cases represent various attitudes of the courts. Some courts are willing to receive such entries where the person making them verifies their correctness on the stand and the original observer—salesman, etc.—is dead or otherwise unavailable (citing cases). Other courts go even further, and admit them without accounting for the original observer, on the sound consideration that it is practically impossible in mercantile conditions to trace and procure every one of the many individuals who reported the transactions (citing cases, including Chisholm v. Machine Co., 160 Ill., 101). On the other hand, some courts refuse to receive such entries even though the original observer is

of baptisms in a certain Roman Catholic church, regularly kept by the priests of that church, and produced from the custody of the present incumbent. The purpose of introducing the book is to show an entry of C's baptism, made by a priest, since deceased. The question is, whether the entry is admissible.

The entry is admissible for the purpose stated, on the ground that it was made in the regular course of business by a party since deceased.[8]

9. Bank A sues Bank B for damages caused the plaintiff owing to the defendant fraudulently representing to the plaintiff that certain parties on paper presented to it for discount were good and solvent, when, as a matter of fact, they were insolvent. The defendant, for the purpose of showing that its opinion, expressed to the plaintiff as to the solvency of those parties, was honestly given, offers in evidence its bank books, which show that the defendant had been treating and dealing with those parties as solvent and reliable customers. The bank books, which are identified by the cashier, are objected to because no preliminary evidence is given by the one who made the entries as to their correctness. The question is, whether the entries are admissible.

It has been held that the entries are admissible without calling the bookkeeper. "At most, he could only testify that the entries made by him are true entries of transactions reported to him by others. . . . It would seem that the cashier, whose function it is to overlook all transactions at the counter, and over the books and test each transaction through all its stages, should be the person most competent to produce the books and vouch for their accuracy."[9]

10. A sues B for a quantity of coal sold and delivered. To show the quantity sold to him, A offers in evidence, against objection, entries made in a book by one E. It was customary

dead or otherwise unavailable (citing cases, including Stettaner v. White, 98 Ill., 77); while others merely exclude them in a given case because he is absent and not accounted for (citing cases, including Swan v. Thurman, 112 Mich., 416)."

8—Kennedy v. Doyle, 10 Allen (Mass.), 161.

9—Continental Nat. Bank v. First Nat. Bank, 108 Tenn., 374.

for C, a workman in the coal pit, to tell D, the foreman, the sales made, and for D (who could not write) to have C make the entries accordingly. The question is, whether the entries are admissible.

The entries, according to the English rule, are inadmissible, because the foreman, for whom they were made, had no personal knowledge that they were true.[10]

11. A material question in issue is, A's age; and the question is, whether an entry in a baptismal register, made by the incumbent (since deceased), that A was baptized on a certain day, and that his birth occurred at a certain time, is admissible in evidence.

The entry is admissible to show the date of A's baptism, but, according to the English rule, it is inadmissible to show the date of his birth, because it was not the incumbent's duty to make it.[11]

12. A brings suit to carry into execution certain trusts created by will. B, a niece of the testatrix, is the sole defendant. To prove her title as next of kin, B has to establish the marriage of her grandfather, C. To do this, she offers in evidence, against objection, an entry in a book of King's College, Cambridge, in which it was the practice to enter the proceedings of the Provost and Fellows, and for the Registrar of the College, who was a notary public, to sign the entries in that character. The entry in question is in the handwriting of the person who made the entries when it was made, but it is not signed. The question is, whether it is admissible.

The entry is inadmissible. An unsigned entry is not admissible in evidence, notwithstanding that it is proved to be in the handwriting of the person who usually made the entries at the time it was made.[12]

13. In an action by A against B, it becomes material to show the date of a certain surgical operation performed by C upon

10—Brain v. Preece, 11 M. & W., 773.

11—R. v. Clapham, 4 C. and P., 29; Kennedy v. Doyle, 10 Allen (Mass.), 161.

12—Fox v. Bearlock, L. R., 17 Ch. Div., 429.

D. The question is, whether entries in C's daybook, charging D for the services performed, are admissible in evidence.

The entries are admissible. According to the English rule, which is followed in some states, an essential of admissibility is C's death. If, however, C were a party to the litigation, the entries would be admissible. The reason for this discrimination is not at all clear. It seems that the death of the entrant should not be an essential in either case.[13]

14. A sues the B Ry. Co. to recover damages caused by defendant's locomotive engine colliding with his wagon. To show the extent and character of the damages, A offers in evidence, against objection, entries in the account-book of C, since deceased, who repaired the wagon. The question is, whether the entries are admissible.

The entries are admissible. They were made in the regular course of business, by a person since deceased, and are therefore admissible in an action between third parties.[14]

15. The Bank A sues D, a depositor, for $1000, the amount he had overdrawn his account. To prove that he had overdrawn to this extent, the bank offers in evidence, against objection, its books. The daybook was kept by C, who is now insane, and his handwriting is proved. The question is, whether this book is admissible in evidence.

The book is admissible. The death of the bookkeeper is not essential. His insanity is sufficient to justify proof of his handwriting. Some courts hold that absence from the state is sufficient.[15] An instrument attested by a person who has become blind may be proved by first proving his handwriting.[16] C's insanity renders him as incapable to testify as his death.[17]

13—Augusta v. Windsor, 19 Me., 317.

14—Lassone v. Boston & L. R. Ry. Co. (N. H.), 24 Atl. Rep., 902, in which citation the subject is fully discussed and numerous cases given.

15—Elms v. Chevis, 2 McCord, 350.

16—Pedler v. Paige, 1 Moody & Rob., 258.

17—Union Bank v. Knapp, 20 Mass., 96; same case, 15 Am. Dec., 181. For valuable note on this subject see 15 Am. Dec., 191.

ILLUSTRATIONS ON DECLARATIONS BEARING UPON THE PHYSICAL OR MENTAL CONDITION OF THE DECLARANT, OR UPON HIS INTENTION.

1. A's widow and her paramour are on trial for murdering A by poison. Their plea is that A committed suicide. In support of their plea they offer in evidence, against objection, declarations of the deceased, made at different times within a year prior to his death, and prior to his last sickness, that he intended to take his own life. The question is, whether the declarations are admissible.

Some courts, including those of Illinois, exclude such declarations because they do not accompany and characterize some act or conduct relevant in the litigation.[1] Assuming, however, that A's mental condition, at the various times at which he made the declarations, is relevant in the litigation, the declarations, according to the better view, are admissible.[2]

2. A's administrator, B, sues the C Ry. Co. to recover damages for causing A's death. An important fact in issue is, whether A, at the time of the accident which caused her death, sustained the relation of an intended passenger or not. To show that she did, B offers in evidence, against objection, a declaration, made to a neighbor woman, by A at her home while getting her children ready for school, about an hour before the accident, that she was going on the nine o'clock train to the city because that would take her near to Siegel & Cooper's. The question is, whether the declaration is admissible.

The answer to question 1 is also applicable to this one.[3]

3. A is on trial for the murder of B. His plea is that B committed suicide. In support of this plea, A offers in evidence, against objection, a declaration made by B the day before her death to a trance medium, that she was five months pregnant with child, and had come to consult as to what to do, (adding later in the interview) that she was going to drown herself.

1—Siebert *et al* v. The People, 143 Ill. 571.

2—Com. v. Trefethen, 157 Mass. 180.

3—C. & E. I. Ry. Co. v. Chancellor, 165 Ill. 438.

The question is, whether B's declaration is admissible.

B's declaration is admissible. Her state of mind, at the time she made it, is relevant in the litigation, and her declaration made at that time is relevant to show it.[4]

4. A sues the B Ins. Co. to recover $10,000, insurance on her husband's life. The defendant Co. denies that A's husband is dead, and claims that the body (found by the camp-fire on Crooked Creek), which A alleges is that of her husband, is the body of one W. To show this, the Co. offers in evidence, against objection, two letters, written by W about two weeks before the body in issue was found, one to his sister and one to his fiancee, in which he expressed an intention to leave the place he was at and go with A's husband, an intention which if true is relevant to the question of identity of the body in issue. The question is, whether the letters are admissible.

The letters are admissible to show the intention of W expressed in them. This intention is a material fact in a chain of circumstances which are relevant to the question of identity of the body in issue; and evidence that he expressed that intention, at the time he entertained it, is as direct evidence of the fact as his own testimony that he then had that intention would be.[5]

5. A seeks to probate what purports to be a copy of B's will. The probate is contested by B's two sons. A alleges that B's will had been deposited in a valise belonging to B, which, after B's death, had been delivered to his two sons, and that thereafter it was claimed that the house in which the valise had been kept was burglariously entered, the valise cut open, and its contents extracted. The only evidence of the contents of the will consists in post-testamentary declarations of B. The question is, whether these declarations are admissible in evidence, and sufficient to establish the contents of the will.

According to some decisions post-testamentary declarations of

4—Com. v. Trefethen, 157 Mass. 180 (This decision expressly overrules the decision in Com. v. Felch, 132 Mass. 22).

5—Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285. This is a remarkable case. It has been in litigation for more than 25 years. There have been 3 inquests and 6 jury trials. See 188 U. S. 208 (1903).

the testator are never admissible to establish the contents of his will. According to other decisions they are admissible as corroborative evidence, but are not sufficient in themselves to establish the contents of the will. This rule obtains in England,[6] and generally in this country, including Illinois.[7] Chancellor Irvine says, "The importance of interests involved in probate cases in England is such that the decisions of English courts on such subjects are entitled to great weight, and we may safely say that the result of the English cases is that the contents of a lost will cannot be established solely by the declarations of the testator, although such declarations are now deemed admissible for the purpose of corroboration. The American cases relied on to support proponent's theory are, when examined, in strict accordance with the English rule."[8] Since B's declarations constitute the sole evidence to prove the will they should be rejected.[9]

6. A sues the B Ins. Co. upon a policy of accident insurance issued to C. The declaration avers that the deceased accidentally, severely and fatally strained and injured his body in the abdominal region by lifting a box of ashes and cinders, from which strain he died. The court admits in evidence, against objection, statements made by the deceased to his physician, two or three days after the alleged accident, in regard to the cause of the injury from which he was suffering; and A recovers a verdict for $2000. The question is, whether the court's ruling is prejudicial error.

The court's ruling is prejudicial error. Statements made subsequently as to the cause of an injury are inadmissible though made to a physician.[10]

7. A sues the B Ry. Co. to recover damages for a personal injury alleged to have been sustained by her owning to the defendant company's negligence, in consequence of which she was confined to her bed for five weeks. A's servant, who testifies in the case, is asked, "What did you notice about her (A) during the five weeks?" The servant replies, "She complained of pain very much all the time." A motion is made to strike out

6—Sugden v. St. Leonards, 1 Pr. Div. 154; Woodward v. Gouldstone, H. of L., 11 Ap. Cas. 469

7—*In re* Page, 118 Ill. 576.

8—Clark v. Turner, 50 Neb. 290.

9—Clark v. Turner, 50 Neb. 290.

10—Globe Accident Ins. Co. v. Gerisch, 163 Ill. 625.

this answer, but the court allows it to stand. A recovers a verdict for $5000. The question is, whether the court's ruling is prejudicial error.

According to the rule which obtains in Illinois, the court's ruling is prejudicial error. In this state, declarations as to pain and suffering of an injured person are not admissible in an action for damages except when made at the time of the injury, so as to be a part of the *res gestae,* or to a physician during treatment.[11]

(The physician-limitation seems to have originated with Chief Justice Bigelow.[12] Professor Wigmore designates it "this peculiar doctrine," and says, "The limitation was never heard of until Barber v. Merriam, and even in that case the opinion almost certainly meant to enlarge and not to restrict the Exception." He also holds that it is unorthodox and followed only in New York and in a few other jurisdictions.[13] On the other hand, Justice Mitchell says, "According to the great weight of modern authorities, the mere descriptive statements of a sick or injured person as to the symptoms and effects of his malady are only admissible under the following circumstances. First. They must have been made to a medical attendant for the purposes of medical treatment."[14] . . . Many courts, however, hold that such declarations are admissible when made to anyone. Upon principle, this view seems sound.)

8. A sues the B Ry. Co. to recover damages for personal injuries. For the purpose of eliciting proof regarding her injuries, her counsel asks a witness, who had nursed her, the following question: "During that time how did she appear with reference to pain and suffering?" The court permits it to be answered, against objection, and the answer is: "She seemed to be suffering pain and unable to see out of her eye; very nervous." A recovers a verdict. The question is, whether the court's ruling is prejudicial error.

The court's ruling is not prejudicial error. In an action for

11—Lake St. Elev. Ry. Co. v. Shaw, 203 Ill. 39; Cicero Street Ry. Co. v. Priest, 190 Ill. 592.

12—Barber v. Merriam, 11 Allen (Mass.) 322.

13—Wigmore on Evid. Vol. III., §1719.

14—Williams v. Gt. Northern Ry. Co., 68 Minn. 55.

personal injury it is proper to permit a witness to be asked the question how the plaintiff appeared with reference to pain and suffering; and the person who nursed her after the injury may testify whether she appeared to be suffering pain, and may state such natural manifestations of pain as she exhibited in connection with the injury, whether by groans, expressions of the features or in other ways.[15]

9. A sues the city of B to recover damages for injuries caused by a defective street. To show the extent of his injuries, the testimony of physicians, called as witnesses by him, as to what he said to them while being examined and treated, in describing his feelings and detailing the nature and location of his pains and sufferings, is admitted against objection. A recovers a verdict. The question is, whether the court's ruling is prejudicial error.

The court's ruling is not prejudicial error. The testimony given is not a recital of any past event, but the natural expressions of existing pain and suffering. It is therefore admissible under the restricted New York rule, which obtains in a few other jurisdictions including Illinois, and which limits the admissibility of this class of declarations to statements made to a physician, except where they form part of the *res gestae*.[16]

10. The facts in issue are, (1) whether A, at the time he made his will, was mentally competent to make a will; (2) whether he had been unduly influenced in the making of it; (3) whether fraud or duress had been used upon him to make it. The question is, whether post-testamentary declarations by him are admissible to show these facts.

As to A's mental capacity to make a will, the declarations are admissible, provided they were not too remote.[17] Such declarations, as well as ante-testamentary declarations, if not too remote, are admissible because they are material in showing inferentially the declarant's mental condition at the time of the testamentary act.

The declarations are also admissible to show undue influence,

15—The Cicero, etc., Ry. Co. v. Priest, 190 Ill. 502.

16—City of Salem v. Webster, 192 Ill. 369.

17—Waterman v. Whitney, 11 N. Y. 157.

owing to the fact that it is so closely connected with, and dependent upon, the testator's mental condition.[18] Jarman says, "The amount of undue influence which will be sufficient to invalidate a will must of course vary with the strength or weakness of the mind of the testator."[19] Wigmore says, "The existence of undue influence or deception involves incidentally a consideration of the testator's *incapacity to resist pressure* and his susceptibility to deceit, whether in general or by a particular person."[20] Justice Seldon says, "So the mental strength and condition of the testator is directly in issue in every case of alleged undue influence; and the same evidence is admissible in every such case, as in cases where insanity or absolute incompetency is alleged."[21]

As to the admissibility of the declarations to show fraud or duress, the decisions are not harmonious. Justice Seldon says, "where the . . . will is disputed on the ground of fraud, duress, mistake, or some similar cause, aside from the mental weakness of the testator, I think it equally clear that no declarations of the testator himself can be received in evidence except such as were made at the time of the execution of the will, and are strictly a part of the *res gestae*."[22] Wigmore says, "The testator's assertion that a person, named or unnamed, has procured him by *fraud* or *pressure* to execute a will or to insert a provision, is plainly obnoxious to the Hearsay rule, if offered as evidence that the fact asserted did occur. . . . For this reason they (such declarations) are by most Courts regarded as inadmissible . . . But these utterances may be nevertheless availed of as evidence of the testator's *mental condition*, if the latter fact is relevant."[23] It may be said, therefore, that post-testamentary declarations of the testator, to show *fraud* or *duress*, are obnoxious to the rule against hearsay and hence inadmissible, unless the fraud or duress incidentally involves his susceptibility to deceit or his mental incapacity to resist external pressure.

11. A seeks to probate B's will. The evidence shows that B made a later will in which she expressly revoked all former wills

18—Waterman v. Whitney, *supra.*

19—I. Jarman on Wills, 36.

20—Wigmore on Evid., §1738, (2), (a).

21—Waterman v. Whitney, *supra.*

22—Waterman v. Whitney, *supra.*

made by her and that she subsequently cancelled the later will. The question is, whether oral declarations by A, made after she cancelled the later will, are admissible to show that in cancelling that will she did not intend to revive the former one.

A's subsequent oral declarations are admissible. They show the intention which existed in her mind when she made them, and from this intention an inference is drawn as to the intention she had when she cancelled the later will.[24]

12. A seeks to probate B's will. The evidence shows that the will was discovered in a barrel, among some waste papers, and either torn or worn into several pieces, which were loosely scattered among the papers in the barrel, and that when discovered it was twenty-five years old. The question is, whether declarations made by B, after the will was torn up, are admissible to show whether the tearing was done by her or some other person, and if by her, whether accidentally or intentionally and for the purpose of revoking her will.

The declarations are admissible for the purposes stated, but they are not admissible as separate and independent evidence of a revocation.[25] Their admissibility for the purposes stated is based upon the double process of inferences discussed in § 15 of this chapter. Their inadmissibility to prove an act of revocation is based upon the fact that the statutes require either a written revocation executed with the same formalities as the will itself, or some act amounting to a virtual destruction of the will, such as burning, tearing, obliterating, etc., accompanied by an unequivocal intention to revoke it. Mere words will in no case amount to a revocation.[26]

23—Wigmore on Evid., Vol. III., §1738.

24—Pickens v. Davis, 134 Mass. 252.

25—Lawyer v. Smith, 8 Mich. 411.

26—Waterman v. Whitney, *supra.*

ILLUSTRATIONS ON DECLARATIONS RELATING TO OR FORMING PART OF THE RES GESTAE.

1. A sues B for damages for injuries caused by B's dog biting her. The question is, whether a declaration, made by A to her mother as she entered her parents' house crying, within five minutes from the time she was injured, that B's dog had bitten her, is admissible in evidence.

The declaration is inadmissible. "Proof of the fact that she was crying or complaining of pain, would have been admissible to show that she was then suffering, but not her statement of the cause of the pain. To render such a declaration admissible as a part of the *res gestae* it must characterize or explain some material act or occurrence which it accompanies. The *res gestae,* the occurrence, which was material, was the act by which the plaintiff was injured. Her declarations made while the injuries were being inflicted, were a part of that occurrence, and if they characterized or explained it would have been admissible. If not made during the continuance of the act, but after the act by which she was injured had been completed, they were but a narrative of a past event; and evidence of such declarations was objectionable as hearsay."[1]

2. A, the administratrix of B, a deck hand on a steamboat, sues C for damages for negligently causing B's death by drowning. B, together with other deck hands, was ordered by the mate of the boat to go on a plank extending over the water from the floor of the boat to the wheel, and the plank broke thereby causing B's death. The question is, whether the declaration of a bystander, made in the hearing of the mate, as he was ordering the men to hurry up, "Look out! that plank is cracked," is admissible in evidence as a part of the *res gestae.*

The declaration constituted a part of the transaction and was admissible as part of the *res gestae.* Declarations of bystanders may be so connected with a transaction as to consti-

1—McCarrick v. Kealy, 70 Conn., 642, 645; Elliott on Evid., Vol. I., § 543.

tute a part of it. In such cases they are held admissible on the same theory as when made by one of the actors.[2]

3. A, a negro, is on trial for assault with intent to kill. He pleads self-defense. He offers in evidence, against objection, declarations of bystanders, "Kill him! Kill him! Don't let that nigger get back to the bottom." The question is, whether the declaration is admissible.

The declaration is admissible. The answer to question 2 is applicable to this one also.[3]

4. A sues the G. Ry. Co. for damages for injuries caused him by the company's negligence. The company pleads contributory negligence. A, who was a passenger on defendant's train, which comprised two passenger coaches, besides the baggage car and the engine, jumped from the baggage car to the ground and was injured. He was induced through fear to jump, owing to the fact that the hind trucks of one coach and the front trucks of the other were thrown from the track. For the purpose of showing that he was justified in jumping, A offers in evidence, against objection, declarations made at the same time by passengers in one of the coaches, which show that they also were very much frightened. The question is, whether the declarations are admissible.

The declarations are admissible. It is not essential that such declarations be made *in the presence* of the injured party. Involuntary declarations caused by appearances of imminent peril may be regarded as a part of the *res gestae*.[4]

5. L is on trial for rape. A and B, two women, saw L at the time of the act. The next day, A called B to the window of her house, and pointing her finger towards L, who was going down the railroad track, said to B, "There goes the man." B replied, "Yes, there he goes." Neither A nor B ever saw L before the rape was committed. They both testify to L's identity. The court, against objection, permits A and B to give in evidence the declarations made by them to each other the day after the crime was committed, and L is con-

2—Louisville &c. Packet Co. v. Samuel's Adm'x., 22 Ky., L. R. 979.

3—Morton v. State, 91 Tenn., 437.

4—Galena &c. Ry. Co. v. Fay, 16 Ill., 558, 568.

victed and sentenced to twenty-five years in penitentiary. The question is, whether the court's ruling is prejudicial error.

The court's ruling is not prejudicial error. "It is a well settled principle in the law of evidence, that whenever it becomes important to show, upon the trial of a cause, the occurrence of any fact or event, it is competent and proper to also show any accompanying act, declaration or exclamation which relates to, or is explanatory of, such fact or event. Such acts, declarations or exclamations are known to the law as *res gestae*. It is not questioned that it was perfectly competent to show that the witnesses saw and readily recognized the accused near the scene of the transaction, on the following day, as testified by them, and it must be admitted the spontaneous exclamation, "There goes the man," with the response, "Yes, there he goes," is highly characteristic of the fact of their recognition. The true test, in all cases, by which the admissibility of such testimony is determined, is, the act, declaration or exclamation must be so intimately interwoven or connected with the principal fact or event which it characterizes, as to be regarded a part of the transaction itself, and also to clearly negative any premeditation or purpose to manufacture testimony."[5]

6. A is on trial for the larceny of a watch. The prosecution shows that A was in possession of the watch shortly after it was stolen; that he met a pawnbroker away from the latter's place of business, and proposed to pledge the watch as security for a loan of money; that the parties thereupon went together to the pawnbroker's shop where A received the money and placed the watch in pawn. A then offered to show by the pawnbroker that when he applied to him for a loan he told him that he did not own the watch, but wanted the money for one B, with whom he had just been conversing; that it was just handed to him to raise the money, and that B heard these statements. The court, however, excludes this testimony, and A is convicted. The question is, whether the court's ruling is prejudicial error.

The court's ruling is prejudicial error for two reasons, viz.: (1) The evidence rejected is part of the *res gestae*, and admis-

5—Lander v. The People, 104 Ill., 248, 256.

sible as such; (2) Since the prosecution has brought out part of the conversation between A and the pawnbroker, A is entitled to have the rest brought out.[6]

7. A is on trial for committing upon B, a boy 14 years of age, a crime against nature. The question is, whether B's delay of more than a year before making complaint against A casts a doubt upon the truth of the charge.

Since both consented to the act, both would naturally desire to keep it secret. The delay, therefore, does not cast a doubt upon the truth of the charge. In rape cases, however, an early complaint is naturally expected and usually made, and in such cases delay would cast doubt upon the truth of the charge.[7]

8. A sues B, the sheriff, in replevin. B claims that A does not own the property seized, that it belongs to C. To prove ownership in C, B offers in evidence declarations of ownership made by C while in possession of the property. The question is, whether the declarations are admissible.

The declarations are verbal acts and admissible as original evidence. They accompanied the act of possession and constituted a part of the *res gestae*.[8]

9. A claims a perpetual easement, (or *profit a prendre,*) to take gravel from B's farm. B denies A's claim. When B sold A the adjoining farm he gave A a written permit to take gravel from B's other farm. The question is, whether declarations by B to the scrivener, at the time the permit was written, that the permission was personal to the grantee and that he would not put it in the deed, are admissible to show that the written permit is only a license.

The declarations are verbal acts explanatory of B's motives, made contemporaneously with the transaction which they accompanied, and are admissible as original evidence.[9]

10. A sues the B. Ry. Co. for damages for causing the death of C, A's intestate, by one of its conductors pushing him off a street car as a result of which he was run over. Immediately

6—Comfort v. The People, 54 Ill., 404.

7—Houselman v. The People, 168 Ill., 172.

8—Amick v. Young, 69 Ill., 542.

9—Lambe v. Manning, 171 Ill., 612.

after the accident C got up, walked over to the sidewalk and sat down. In response to a question, when the car he was on and which was running at good speed had gone about a block, he made declarations that the conductor threw him off the car. The trial court admits this declaration, against objection, and a verdict is returned for the plaintiff. The question is, whether the court's ruling is prejudicial error.

The court's ruling is prejudicial error. "The declarations were not part of the *res gestae*. They were not made at the time of the accident, nor did they explain or characterize the manner in which the accident occurred. They were not concurrent with the injury, nor uttered contemporaneously with it so as to be regarded as a part of the principal transaction, They were made after the injury was received and were merely narrative of what had taken place."[10]

11. C is on trial for unlawfully abusing a female child under the age of sixteen years. The question is, whether the fact, that the child made complaint to her mother the next morning after the occurrence as to what had been done to her by C the night before, is admissible against him.

Assuming that the child has testified in the case, the fact that she made complaint next morning is admissible. It is not essential to its admissibility that the complaint constitute a part of the *res gestae*. "The test is whether, according to the principles of the exception, her having made the complaint tends to corroborate testimony given by the child at the trial." "The evidence is not admitted as a part of the *res gestae*, or as evidence of the things alleged, or solely for the purpose of disproving consent, but for the more general purpose of confirming the testimony of the ravished woman."[11] Some cases hold that lapse of time before making complaint goes only to its weight, not to its competency.[12] If the lapse of time is too great, however, the fact of the complaint will be excluded.[13]

12. A sues the B. Ry. Co. to recover damages sustained in consequence of personal injuries received by his wife while a

10—Chicago W. D. Ry. Co. v. Becker, 128 Ill., 545.

11—Com. v. Cleary, 172 Mass., 175.

12—State v. Mulkern, 85 Me., 106; State v. Niles, 47 Vt., 82, 86.

13—People v. O'Sullivan, 104 N. Y., 481, 490.

passenger on defendant's train. A material fact in issue is the speed of the train at the time of the injury.

The court, against objection, admits in evidence a declaration by the engineer of the train, made between ten and thirty minutes after the accident occurred, that the train was moving at the rate of eighteen miles an hour. A recovers a verdict for $9,000. The question is, whether the court's ruling is prejudicial error.

The court's ruling is prejudicial error, and the judgment should be reversed and the case remanded for a new trial. "His (the engineer's) declaration, after the accident had become a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of eighteen miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries arose. It was in its essence, the mere narration of a past occurrence, not a part of the *res gestae,*—simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted."[14]

13. A sues the B. Ry. Co. for damages for personal injuries received by her in a collision between a street car of defendant company and a cab of the transfer company in which she was being conveyed as a passenger. The question is, whether a declaration of the cab driver, just after the accident, that it was all his fault, is admissible in evidence in favor of the defendant company.

The declaration is inadmissible. "The event had fully transpired, and what was said was purely narrative of a past transaction fully ended, and did not characterize or in any way relate to a transaction then taking place."[15]

14. A is on trial for the murder of his wife, B. On the day of the homicide A had a long interview with B, in which he sought for leave to return and live with her, which B refused. At the close of the interview, A left B, but returned within

14—Vicksburg, etc. Ry. Co. v. O'Brien, 119 U. S., 99.

15—Springfield, etc., Ry. Co. v. Puntenney, 200 Ill., 9.

half-an-hour and shot her, and then himself. A recovered but B died. The court allows C, a witness, against objection, to testify to a conversation with B about ten minutes after A left her, and fifteen minutes before he returned and shot her, to the effect that B told C that A warned her (B) that if he could not come and see her that night he would kill her. A is convicted. The question is, whether the court commits prejudicial error in admitting the conversation between B and C.

In admitting the conversation between B and C in evidence the court commits prejudicial error.[16] It did not take place in the presence of A, nor did it constitute a part of the *res gestae.* "Declarations, to become a part of the *res gestae,* must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and to so harmonize with them as obviously to constitute one transaction."[17] "It is quite well settled that what occurs before or after the act has been done does not constitute a part of the *res gestae,* although the interval of separation may be very brief."[18]

15. A sues the B. Ry. Co. to recover damages for the death of her husband, C, who was run over and killed by defendants' street car. Immediately before the accident, a lineman, in the employ of the company, who had been riding on the front platform jumped off the car and ran ahead. After the car had passed he was seen to have hold of the body of C, which was still on the railroad track. Declarations of the lineman, made immediately after the accident, and before the body of the deceased had been removed from the tracks, to the effect that he had run ahead to pull the deceased off the track and did not have time to do it, are offered in evidence, against objection; and also declarations of the motorman, made within two minutes of the occurrence of the accident, and while he and other employees of the company were in charge of the

16—Montag v. The People, 141 Ill., 75, 83.

17—Greenleaf on Evid., Vol. I., sec. 108, note; Rockwell v. Taylor, 41 Conn., 55.

18—Montgomery v. The State, 80 Ind., 338.

body, to the effect that he could have stopped the car in time, but that he supposed that a lineman, who had jumped from the car and run ahead, would have had the deceased removed from the track before the car reached him. The question is, whether the declarations of the lineman and of the motorman are admissible against the company.

The declarations of both parties are admissible as a part of the *res gestae*. The lineman's declarations, made at the time of his acts which were part of the occurrence, "explained the nature of his acts which were part of the occurrence under investigation. The declaration of the motorman, of which proof was offered, was separated in time two minutes only from the infliction of the injuries. It emanated from the act it was unconsciously associated with and stood in immediate causal relation to it. The occurrence had not ended. He was not speaking as the narrator of a past event, but as a participant in an uncompleted one."[19] "The *res gestae* may therefore be defined as those circumstances which are the undesigned incidents of a particular litigated act and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not promoted by the calculated policy of the actors."[20]

16. A is on trial for the murder of B. The question is, whether a declaration of B, to the effect that A had cut her throat, made while the blood was gushing in great quantities from the cut which had just been made across her throat, and while she was in the act of fleeing from A, who himself was in the act of fleeing from pursuit, is admissible in evidence as a part of the *res gestae*.

19—Coll v. Easton Transit Co., 180 Pa. St., 618.

20—Wharton on Evid., sec. 259 (2nd ed.).

The declaration is admissible as a part of the *res gestae*.[21] It was near enough in point of time with the principal transaction to clearly appear to be spontaneous and unpremeditated, and free from sinister motives, and to afford a reliable explanation of the principal transaction.[22] A celebrated English case,[23] however, holds the contrary; but it is undoubtedly unsound.[24]

17. A is on trial for the murder of B by shooting. C, who heard the shot, ran a distance of two or three hundred yards and arrived at the place where the shooting was done within a minute and a half after B was wounded, when she (B) immediately accused A of having shot her. The question is, whether B's declaration is admissible against A.

B's declaration is inadmissible. It did not constitute a part of the *res gestae*.[25] It seems, however, that it might well be held admissible as a spontaneous declaration. The nervous excitement produced by the shooting probably still continued when the declaration was made so that at that time the reflective faculties of the declarant were still dormant.

18. A is on trial for the murder of B by shooting him. About two minutes after C heard the report of the gun, he heard B say to a woman near him "if you had not taken the gun from me it would have been different." The court rejects B's declaration, and he is convicted. The question is, whether the court's ruling is prejudicial error.

The ruling of the trial court is prejudicial error. "From it the jury might have drawn one of two inferences. . . But whatever the inference, it was one which the jury in weighing all the complicated facts should have been permitted to draw, and in our opinion it was a part of the *res gestae*, an undesigned incident of the homicide which the jury were considering, and the circuit court erred in excluding it."[26]

21—Com. v. Van Horn, 188 Pa. St., 143.

22—Keyes v. City of Cedar Falls, 107 Ia., 509.

23—Regina v. Beddingfield 14 Cox. Cr. Ca., 341.

24—Vols. 14 and 15 American Law Review. In these volumes the late Professor Thayer gives a complete review of Beddingfield's case, and questions the soundness of the decision.

25—Binns v. State, 57 Ind., 46.

19. A sues the B. Ry. Co. for damages for causing C's death. D, the conductor of the train on which C was employed as a brakeman, was on the "caboose" when he received notice that C had been injured while coupling cars, and he immediately ran forward and found C under the rear end of the second car from the engine. D immediately took him from under the car, and while doing so, asked him, "How did this happen?" C replied, fully describing the cause of the accident. The question is, whether C's declarations to D are admissible.

C's declarations are admissible. "It is not always easy to determine when declarations having relation to an act or transaction should be received as part of the *res gestae,* and much difficulty has been experienced in the effort to formulate general rules applicable to the subject. This much may, however, be safely said, that declarations which were the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself (citing many cases)."[27] It seems, however, that, upon principle, the admissibility of the declarations should be founded upon the doctrine of spontaneous declarations rather than upon the doctrine of verbal acts.

20. A is on trial for having taken indecent and improper liberties with the person of a female child under the age of fourteen years. Immediately after the alleged offense, the child made complaint to her mother. The mother, against objection, is permitted by the court to state upon the stand the full details of the complaint, and A is convicted. The question is, whether the court's ruling is prejudicial error.

The court's ruling is prejudicial error, and the verdict and judgment must be set aside and a new trial granted.[28] A is

26—State v. Hudspeth, 150 Mo., 12, 28.

27—The Louisville, etc., Ry. Co. v. Buck, 116 Ind., 566, 576.

28—People v. Hicks, 98 Mich., 86.

not on trial for rape. In rape cases, third parties are sometimes allowed to give in evidence the details of the complaint. This is the modern English rule. In this country, however, the weight of authority is to the contrary. In Michigan such evidence is allowed.[29] Greenleaf says, "Though the prosecutrix may be asked whether she made complaint of the injury, and when and to whom, and the person to whom she complained is usually called to prove that fact, yet the particular facts which she stated are not admissible in evidence, except when elicited in cross-examination, or by way of confirming her testimony after it has been impeached. On the direct examination, the practice has been merely to ask whether she made complaint that such an outrage had been perpetrated upon her, and receive only a simple yes or no. Indeed, the complaint constitutes no part of the *res gestae;* it is only a fact corroborative of the testimony of the complainant, and where she is not a witness in the case it is wholly inadmissible."[30]

29—People v. Gage, 62 Mich., 271.

30—3 Greenleaf on Evid., § 213.

ILLUSTRATIONS ON OPINION EVIDENCE.

1. A is on trial for robbery. The state offers, against objection, evidence by the wife and daughter of the person robbed, that they recognized A by his voice, and are positive as to his identification. The question is, whether the evidence offered is admissible.

The evidence offered is evidence of a fact, ascertained through the sense of hearing, and not the statement of a mere matter of opinion. It is a conclusion resulting directly and primarily from an operation of the sense of hearing, and is admissible.[1]

2. A is on trial for murder. His defense is that when he struck the blow he was suffering from the disease of delirium tremens. The question is, whether opinion evidence, by physicians particularly experienced in the observation of this disease, based upon hypothetical questions, is admissible.

The opinion evidence is admissible, provided the hypothetical question is within the scope of the facts proved; otherwise not.[2]

3. The probate of A's will is contested on the ground of A's mental incapacity at the time he executed his will. The question is, whether letters, sent to A's house about the time the will was executed, by persons since deceased, and indicating the opinion of the writers that A was a rational person, capable of doing acts of ordinary business, are admissible.

The opinion expressed in the letters was not made under oath, and for this reason is inadmissible.[3]

4. A, the beneficiary in two policies of insurance upon the life of her husband, sues the insurance company on the policies. The company defends on the ground that the assured committed suicide. A admits this, but contends that when he committed the deed he "was not in possession of his mental faculties, and was not responsible for said act." The question

1—Ogden v. People, 134 Ill., 599; Com. v. Scott, 123 Mass., 224; Wilbur v. Hubbard, 35 Barb., 303.

2—United States v. McGlue, 1 Curtis, 1.

3—Wright v. Doe de Tatham, 5 Cl. & F., 670.

is, whether the opinions of non-professional witnesses, as to deceased's sanity at the time he killed himself, are admissible.[4]

The opinions of the non-professional witnesses, predicated upon facts detailed by others, are inadmissible; but the conclusions of such witnesses, based upon personal knowledge of the circumstances involved in such inquiry, are admissible. The facts, however, upon which such conclusions are predicated, must first be stated to the jury.[5]

5. A sues B in trespass for cutting down a bank which had been erected to prevent the sea from overflowing A's land. B pleads justification on the ground that the bank contributes to the choking and filling up of the harbor. To controvert B's plea, A offers in evidence the opinion of S, based upon facts within his personal knowledge, and admitted to be true, that the bank is not the cause of the mischief, and that cutting it down will not remove it. S is an eminent engineer, who understands the construction of harbors, the causes of their destruction, and how remedied. The question is whether the opinion of S should be admitted in evidence.

The question in issue involves a matter of science. S is specially qualified to give an opinion upon such a question. His opinion is based upon facts within his personal knowledge, and which are admitted to be true. It follows, therefore, that his opinion should be admitted.[6]

6. A sues B, in trespass upon the case to recover damages for injuries to his fruit trees, caused by smoke, heat and gas, from B's brick kilns. To prove the amount of damage caused, A offers in evidence the opinions of C and D, two gardeners, who have had practical experience in the cultivation of fruit trees, and who have stated to the jury, in detail, the nature and extent of the injuries caused. The question is, whether the opinions of C and D, as to the amount of damage caused, are admissible.

As a general rule, witnesses are to testify to facts, and the jury are to draw inferences and form opinions. If, however,

4—Upstone v. The People, 109 Ill., 169.

5—Connecticut, etc. Life Ins. Co. v. Lathrop, 111 U. S., 612.

6—Folkes v. Chadd, 3 Doug. (K. B.), 157.

the facts cannot be palpably described to the jury, the witnesses may state their opinions. Assuming that the descriptive evidence of C and D falls short of enabling the jury to estimate the amount of damage done, as well as C and D are able to do, their opinions are admissible.[7]

7. A sues the B. Ry. Co. for damages caused by the negligence of the defendant Co., whereby A's leg was broken. The question is, whether the opinions of physicians, as to the consequences of a hypothetical second fracture of A's leg, and the opinions of merchants, in the same line of business as A, as to the amount of damages he has sustained in consequence of his absence from his business, are admissible in evidence.

The opinions, in both cases, are inadmissible, because they are too conjectural and likely to mislead the jury. The opinions of the physicians relate to a matter too remote, and are "calculated to draw the minds of the jury into fanciful conjectures." As regards the opinions of the merchants, "There may be a tolerable conjecture of the amount of damage, and merchants in the same line of business with the plaintiff, and residing in his vicinity, might carry it nearer the truth than others; but their opinions can rise no higher than mere conjecture."[8]

8. A sues B for damages for breach of his contract. It is material to the issue to prove the value, at a particular date, of certain gunny bags. The question is, whether evidence by expert brokers, whose information, as to the value of said gunny bags at the particular date, was obtained from "daily price current lists and returns of sales daily furnished them in Boston from their New York houses," is admissible.

The experts are competent witnesses to testify to the fact in issue, and the source of their information justifies the admission of their evidence.[9]

9. A sues B in trespass on the case for an injury caused by a pile of stones placed by B in a public highway. The

7—Vandine v. Burpee, 13 Metc., 288.

8—Lincoln v. The Saratoga, etc. Ry. Co., 23 Wend., 425.

9—Whitney v. Thacher, 117 Mass., 523.

question is, whether a witness, who is accustomed to the use of horses, knows their characteristics, has observed the effect produced upon them by the sight of piles of stones and other objects, and who has stated to the jury his knowledge upon these points, and given the dimensions and location of the pile of stones in issue, should be allowed to answer the question, "Whether an object like this pile of stones would be likely to make an ordinarily gentle horse shy."

As the descriptive evidence of the witness, as to the pile of stones, would necessarily fall short of enabling the jury to see the situation as the witness saw it, his opinion is admissible. "The fright is the result of a combination of form, color, and relative position, which would elude the effort of any witness clearly and fully to describe."[10]

10. A sues B in trespass on the case for an injury caused by A's horse becoming frightened at B's four-horse wagon loaded with wood. The question is, whether a witness, who has not seen B's four-horse wagon loaded with wood, may state his opinion, based upon descriptive evidence given by other witnesses, as to whether there was anything about B's wagon and horses calculated to frighten an ordinarily quiet and well-broken horse.

The fact elicited does not call for expert opinion evidence. Non-expert opinion evidence can be based only upon personal knowledge. Therefore, the opinion of the witness is inadmissible.[11]

11. A sues the B. Ry. Co. to recover damages for personal injuries received, shortly after alighting from defendant's train, in passing from a raised platform to one having a lower level.[12] The question is, whether the personal opinions of eye witnesses "that the platform, from the way it is built, is not only not safe, but it is actually a trap, from the very fact that

10—Clinton v. Howard, 42 Conn., 294.

11—Baltimore Turnpike Co. v. State, 71 Md., 573.

12—The courts of the United States, and those of last resort of nearly all of the states, allow this class of evidence; but those of New York, Massachusetts and Pennsylvania exclude it.

it is raised nine inches above the level of the ground, without any side protection," is admissible.[13]

As the facts in issue come within the range of ordinary experience, and are such that they can be fully and palpably described to the jury, the opinions of the witnesses are inadmissible.[14]

12. A sues the O. & M. Ry. Co. to recover damages for injury to his crops, which, he alleges, was caused by defendant company building an embankment across a certain watercourse, as a result of which A's lands were overflowed. The question is, whether the defendant company may show by expert opinion evidence that the injury to A's crops was the result of an overflow produced by natural causes and not by the embankment.

Where the subject matter of inquiry is of such a character that it may be presumed to be within the knowledge of ordinary men, the opinions of experts are inadmissible; but, where the subject matter relates to scientific knowledge, not possessed by men in general, the opinions of persons who have made the subject matter of inquiry the object of particular study are admissible. As the subject matter of the expert opinion evidence in question belongs to the latter class, such evidence is admissible.[15]

13. A is on trial for the larceny of cattle which belonged to the D. T. Cattle Company. Fresh hides were found in A's wagon out of which the brands had been cut. In one case, the brand had been only partially removed, and the state offers expert opinion evidence to show that the part of the brand

13—"Opinions are never received if all the facts can be ascertained and made intelligible to the jury, or if it is such as men in general are capable of comprehending and understanding. The ordinary affairs of life cannot be the subject of expert testimony." Am. & Eng. Encyc. of Law, vol. 7, p. 493, edition 1.

"But where the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men, without special knowledge or training, opinions of witnesses, expert or other, are not admissible." Mitchell, J., in Auberle v. McKeesport, 179 Pa., 321.

14—Graham v. Penn. R. R. Co., 139 Pa., 149.

15—O. & M. Ry. Co. v. Webb, 142 Ill., 404.

remaining was a part of the D. T. brand of the D. T. Cattle Company. The question is, whether such evidence is admissible.

Where animals are branded and turned loose upon the public range, as they are in the western country, the brands, which are usually unintelligible to non-experts, may readily and accurately be deciphered by experts. For this reason, the evidence which the state offers is admissible.[16]

14. A is on trial for murder. B, a non-expert witness for the state, is allowed, against objection, to testify that certain hairs which were found adhering to a certain club appeared, to the naked eye, to be human hairs; and C, another non-expert witness for the state, is allowed, against objection, to testify that they resembled the hairs of the deceased. The question is, whether the evidence objected to is admissible.

The evidence of both witnesses is admissible. The objection to it, in each case, rests upon the general principle that witnesses who are not experts cannot testify to their opinions. There is, however, a large class of facts in regard to which only conclusions can be expressed.[17]

15. A sues B for breach of promise of marriage. C, one of A's witnesses, testifies, against objection, that after B left A for a journey to the western states "the plaintiff acted as if she felt very sad." The question is, whether this evidence is properly admitted.

The subject matter, to which the evidence relates, cannot be reproduced or described to the jury precisely as it appeared to the witness at the time. The fact, upon which the witness is called to express his conclusion, is such that men in general are capable of comprehending and understanding. For these reasons the evidence is properly admitted.[18]

16. A is on trial for murder. B, a witness for the state, who is familiar with blood, and who examined with a lens a certain blood stain on a coat when it was fresh, is permitted,

16—Askew v. People, 23 Col., 446.

17—Com. v. Dorsey, 103 Mass., 412.

18—Culver v. Dwight, 72 Mass., 444.

against objection, to testify that its appearance when he examined it indicated that it came from below upward, although B has never experimented with blood, or other fluid, in this respect. The question is, whether B's evidence is properly admitted.

B's evidence is properly admitted. The grounds of its admissibility are the two reasons given in the answer to question 15.[19]

17. A, a lawyer, sues B, his client, to recover for professional services, such services resulting in a favorable compromise of the litigation for B. The question is, whether (1) Opinions of other lawyers may be received as to the value of the services rendered; (2) Opinions may be received as to the benefits of the compromise to B in his future business; (3) A hypothetical question containing partial statements of facts, and inferences and conclusions drawn from them, may be submitted to witnesses.

The opinions of other lawyers, as to the value of the services rendered, are admissible. The opinions, as to the benefits of the compromise to B, are inadmissible, as they are calculated to mislead the jury to think that the ultimate benefits to be derived by B are the measure of A's compensation. The hypothetical question is objectionable, and should be excluded, because it is a compound of positive assertions of facts and conclusions.[20]

18. A seeks to probate B's will. C contests it on the ground of mental incapacity of the testator. The question is, whether the trial court errs in refusing to allow C to examine another expert witness on the question of B's mental capacity, after he has examined five expert witnesses on that point.

The court was quite justified in refusing to allow C to examine another expert witness. "If testamentary cases are ever to be brought to a conclusion, there must be some limit to the reception of expert evidence, and that which was fixed in this case was quite liberal enough."[21]

19—Com. v. Sturtivant, 117 Mass., 122.

20—Haish v. Payson, 107 Ill., 365.

21—Fraser v. Jennison, 42 Mich., 206-223.

ILLUSTRATIONS ON REAL EVIDENCE.

1. A sues the city of B for an alleged damage to his lot by a change in the grade of the street. The question is, whether the court has authority to allow the jury, in charge of an officer, to go upon and view the premises, although the trial is four months after the completion of the improvement concerning which the complaint is made.

The court has authority to allow the jury to go upon and view the premises. "If the parties had the right to prove, by oral testimony, the condition of the property at the time of the trial, (and upon this point we think there can be no doubt,) upon what principle can it be said the court could not allow the jury, in person, to view the premises, and thus ascertain the condition thereof for themselves? The premises, on view, may be regarded, as it is termed in the books, real evidence, and oral testimony in reference to the premises could not be as satisfactory in its character as the real evidence."[1]

2. A is on trial for bastardy. The court, for the purpose of showing resemblance between A and the child, allows the jury, against objection, to inspect the child. A is convicted. The question is, whether the court's ruling is prejudicial error.

Upon this question the decisions are in hopeless conflict. Some courts hold, at least in the case of a mere baby, that such evidence is of "to fanciful and unsatisfactory a character to be received."[2] Many courts, however, hold the contrary. Justice Garrison, in a well considered case, says, "Inspection is like admission in that, while not testimony, it is an instrument for dispensing with the testimony, and, in a doubtful case, the class of testimony it dispenses with might be a controlling circumstance. Thus regarded, and in view of the almost utter worthlessness of the testimony of witnesses adduced in the question of the resemblance of a bastard to an alleged parent, it is obvious that inspection is, on this account, also to be pre-

1—Springer v. City of Chicago, 135 Ill., 552, 561.

2—Risk v. State, 19 Ind., 152; Harrison v. People, 81 Ill., App. 93; State v. Danforth, 48 Ia., 43; Clark v. Bradstreet, 80 Me., 456.

ferred.[3] This, upon the whole, is the better view, and sustained by the weight of authority.[4]

3. A sues B, in an action *ex delicto*, for personal injuries. The question is, whether or not the court can compel A to submit his person to an examination by experts.

Upon this question, also, the decisions are not harmonious. The Supreme Court of the United States have answered it in the negative.[5] This decision has been followed in a few states, but the great weight of authority is to the contrary.[6]

4. A sues B for damages for personal injuries. The question is, whether A may voluntarily exhibit his injuries to the jury.

The courts have frequently decided this question in the affirmative. Such a proceeding often gives to the jury important information as to the extent and character of the injuries involved, and does not deprive the defendant of any substantial right on appeal, in view of the fact that the appellate court does not weigh the evidence.[7] Spectacular and unfair exhibitions, however, should be prohibited.[8]

5. A is on trial for selling intoxicating liquor to a minor. The question is, whether the alleged minor may be exhibited to the jury for their inspection in order to determine his age.

Some courts hold that this should not be allowed.[9] According to the better view, however, as well as the weight of authority, such a proceeding is allowable.[10]

6. The fact in issue is, whether A is a negro or not; and

3—Gaunt v. State, 50 N. J. L. 490, 495.

4—Young v. Makepiece, 103 Mass., 50, 54; State v. Smith, 54 Ia., 104; State v. Horton, 100 N. C., 443; Jones v. Jones, 45 Md., 144; Linton v. The State, 88 Ala., 216; Com. v. Jordan, 49 Ohio St., 455.

5—U. P. Ry. Co. v. Botsford, 141 U. S., 250; Cole v. Fall Brook, etc. Co., 159 N. Y., 59, 69 (allowed by statute, however, passed in 1894).

6—Fullerton v. Fordyce, 144 Mo., 519; Ala. etc. Co. v. Hill, 90 Ala., 71; City of South Bend v. Turner, 156 Ind., 418.

7—Disotell v. Henry Luther Co., 90 Wis., 635; Louisville Ry. Co. v. Wood, 113 Ind., 544; Rice v. Rice, 47 N. J. L., 559.

8—Clark v. Brooklyn Heights Ry. Co., 177 N. Y., 359.

9—Bird v. Stone, 104 Ind., 384.

10—Com. v. Hollis, 170 Mass., 433; Hermann v. State, 73 Wis., 248; Williams v. Stone, 98 Ala., 52.

the question is, whether he may be exhibited to the jury for their inspection.

The courts very generally hold that such a proceeding is allowable.[11]

7. A sues the B Co. for damages for personal injuries caused by his clothing being caught in the machinery of the defendant company's mill. The question is, whether A's torn clothing may be exhibited for the inspection of the jury.

A's torn clothing may be exhibited, in the discretion of the trial court.[12] The same principle is applicable to injured parts of the body.[13]

8. A sues the city of B for damages for personal injuries sustained by reason of her foot going through a rotten plank in a sidewalk. The court, against objection, allows pieces of the rotten plank to be exhibited for inspection by the jury. A recovers a verdict. The question is, whether the court's ruling is prejudicial error.

The court's ruling is not prejudicial error. The admissibility of such evidence rests in the sound discretion of the court.[14]

9. A sues the B. Ry. Co. for damages for personal injuries sustained by reason of being struck by a passenger train. The court permits A, against objection, to exhibit for the inspection of the jury four photographs, properly verified, of the immediate locality of the casualty, taken about a month after the accident. Changes which had taken place between the time of the accident and the time of taking the photographs were explained by evidence. A recovers a verdict. The question is, whether the court's ruling is prejudicial error.

The court's ruling is not prejudicial error. The matter rests in the sound discretion of the court.[15] In some cases

11—Garvin v. State, 52 Miss., 207; State v. Saidell, 70 N. H., 174; Warlick v. White, 76 N. C., 175; Clark v. Bradstreet, 80 Me., 454.

12—The Tudor Iron Works v. Weber, 129 Ill., 535.

13—Indiana C. Co. v. Parker, 100 Ind., 181, 199; Omaha S. Ry. Co. v. Emminger, 57 Neb. 240; Faivre v. Manderscheid, 117 Ia., 724.

14—Viellesse v. The City of Green Bay, 110 Wis., 160.

15—Wabash Ry. Co. v. Jenkins, 84 Ill. App., 511, 513.

such evidence has been excluded, and the ruling of the court sustained.[16]

10. A sues B in ejectment. Expert witnesses testify that an original deed of the premises, which is in evidence, has been altered by erasing the original writing and substituting new matter. The question is, whether enlarged photographs of the deed are admissible, against objection, for inspection by the jury to illustrate the testimony of the witnesses.

The photographs, if properly verified, are admissible.[17] Greenleaf says that a photograph,—particularly an enlarged one,—of a writing, is a proper method of exhibiting its contents.[18] Where an enlarged photograph is used the method "is not dissimilar to the examination with a magnifying glass."[19]

11. A is on trial for the murder of B by cutting his throat. The court, against objection, admits a photograph of the wound. A is convicted. The question is, whether the court's ruling is prejudicial error.

The court's ruling is not prejudicial error. "The throat of deceased was cut; the character of the wound was important to elucidate the issue; the man was killed and buried, and a description of the cut by witnesses must have been resorted to; we cannot conceive of a more impartial and truthful witness than the sun, as its light stamps and seals the similitude of the wound on the photograph put before the jury; it would be more accurate than the memory of witnesses, and as the object of all the evidence is to show the truth, why should not this dumb witness show it? Usually the photograph is introduced to prove identity of person, but why not to show the character of the wound? In either case it is evidence; it throws light on the issue."[20]

16—C., C., C. & St. L. Ry. Co. v. Monaghan, 140 Ill., 474, 483.

17—Howard v. Ill. Tr. & Sav. Bank, 189 Ill., 563, 579.

18—1 Greenleaf on Evid. (16th ed.), 439.

19—Marcy v. Barnes, 16 Gray, 161.

20—Franklin v. State, 69 Ga., 36; 47 Am. Rep., 748. See also 1 Bish. Crim. Proc., 1097; Whart, Crim. Evid., 544; and cases cited in both texts.

12. A sues the B. Ry. Co. for damages for loss of his wife who was killed by a train. The statute limits recovery to "pecuniary injuries." A, against objection, is allowed to introduce in evidence a photograph of his wife, who was a handsome woman, and he recovers a verdict. The question is, whether the court's ruling is prejudicial error.

The court's ruling is prejudicial error. "The action was to recover for pecuniary injuries resulting from decedent's death. Such injuries are to be compensated for on the basis of the monetary value of the services of deceased to her husband and children. Into such a case the personal element does not enter, for the law does not compensate for grief or sorrow, but only for the actual pecuniary loss. The introduction in evidence of the photograph of a handsome woman could not be expected to accomplish any other result than to introduce the personal element for the consideration of the jury."[21]

13. A, a twenty-year-old girl, sues B and C for damages for personal injuries sustained by reason of being struck by a train. The court, against objection, admits in evidence photographs showing rear views of A's person, nude from below the shoulders to mid-thighs. The question is, whether the court's ruling is error.

The reception in evidence of such photographs is highly improper. "Such photographic exposure of the body of a twenty-year-old girl in a court room full of men is . . . grossly improper and shocking. . . No such indecency is ever necessary, or should be tolerated in court. If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony be given of it."[22]

14. A sues B in ejectment. In order to defeat B's title A undertakes to prove that certain deeds are forgeries. The question is, whether photo-lithographic copies of certain signatures, the originals of which are proved to be genuine, are admissible in evidence as standards of comparison.

21—Smith v. Lehigh Valley Ry. Co., 177 N. Y., 379, 384.

22—Guhl v. Whitcomb et al., 109 Wis., 69.

According to the weight of authority photographic reproductions of the genuine handwriting of the person whose handwriting is in controversy cannot be used as standards with which to compare the disputed writing.[23] A photo-lithographic copy of a person's signature, the original of which cannot be produced, is inadmissible to prove the genuineness of a signature to another instrument purporting to be that of the same person, in the absence of proof that the copy is exact and accurate in all respects, and the affidavit of the officer who has custody of the original as a record, that the copy "is a true and literal exemplification of the original," is not sufficient.[24]

15. A files a bill against her husband B for a divorce on the ground of impotency. The question is, whether the parties to the suit may be compelled by the court to submit to a skilled examination of their persons.

It is well settled both in England and in this country that, in divorce proceedings on the ground of impotency, the court may compel the party alleged to be impotent to submit to a skilled examination of his or her person; and, if the exigencies of the case require it, of the party instituting the proceedings.[25]

16. A is on trial for committing rape on B, an infant under ten years of age. A motion by A that B be compelled by the court to submit to an examination of her person by a medical expert is denied, and A is convicted and sentenced to imprisonment for life. The question is, whether the trial court's ruling is prejudicial error.

The court's ruling is not prejudicial error. If such right exists, it is a matter of discretion with the trial court, to be exercised only in cases of extreme necessity, and not subject to review on appeal.[26]

23—Am. & Eng. Ency. of Law (2nd ed.), Vol. 15, p. 274.

24—Geer v. Lumber and Mining Co., 134 Mo., 85, 95, 98. See also, Hynes v. McDermott, 82 N. Y., 51.

25—Anonymous, 89 Ala., 291; 18 Am. St. Rep., 116; Devanbagh v. Devanbagh, 5 Paige (N. Y.), 558, 28 Am. Dec., 443. For a full discussion of physical incapacity as a ground for divorce, see the extended note to the latter citation.

26—McGuff v. State, 88 Ala., 147, 16 Am. St. Rep., 25.

ILLUSTRATIONS ON EVIDENCE OF EXPERIMENTS.

1. A sues the P Coal Co. for damages sustained by reason of defective machinery. The trial court, against objection, permits A to experiment in the presence of the jury with a correct model of a coal bucket, with some coal in it, for the purpose of showing how the bucket operated when in use, the court stating, "The jury will have to remember, all the time, that a bucket that was actually used and the material that was actually used would be different from the bucket and material here in court; but I will permit it to go in, simply as an illustration of how the accident could have happened." A recovers a verdict. The question is, whether the court's ruling is prejudicial error.

The court's ruling is not prejudical error. It violates no rule of evidence, nor can the defendant be prejudiced by it. The question of allowing experiments in the presence of the jury is one which rests largely in the sound discretion of the trial court.[1]

2. A sues the city of D for damages for personal injuries received by her in falling upon a defective sidewalk, as a result of which she claims that her right side is paralysed. To prove her claim, a doctor, who is not sworn, is permitted against objection, in the presence of the jury, to thrust a pin into the right side of her face, her right arm and right leg, and, from the fact that she fails to wince, the jury are asked to infer that her right side is completely paralyzed. A recovers a verdict for $10,000. The question is, whether the experiment with the pin is prejudicial error.

The experiment with the pin is not prejudicial error. There is no occasion for swearing the doctor for the part taken by him, and in inserting the pin there is nothing to indicate treachery on his part.[2]

3. A sues the B Ry. Co. for damages for cattle killed at a railway crossing by being struck by a train. The company de-

1—Pennsylvania Coal Co. v. Kelly, 156 Ill., 9.

2—Osborne v. City of Detroit, 32 Fed. Rep., 36.

fends on the ground of contributory negligence on the part of A's sister who was in charge of the cattle when they were struck. The court, against objection, allows evidence of experiments, made by witnesses to determine how far the train could be seen from the highway coming to the crossing. A recovers a verdict. The question is, whether the court's ruling is prejudicial error.

The court's ruling is not prejudicial error. The admissibility of the evidence rests in the sound discretion of the court.[3]

4. A is on trial for murder by shooting. The question is, whether evidence of experiments with firearms, of the same pattern and calibre as the one used in committing the homicide, to determine their carrying distance and penetrating force, is admissible.

The evidence is admissible. "It has been quite a common thing, in cases of homicide, to make experiments with firearms, to determine the carrying distance, the penetrating force, and the distance to which fire will be carried by firearms of certain pattern and calibre, and to prove the results of such experiments at the trial, as tending to show the guilt or innocence of the accused."[4]

5. A is on trial for murder. The evidence tends to show that the person who committed the murder wore at the time a certain pair of rubber boots. A testifies that he cannot get these boots on; and makes apparent attempts, in the presence of the jury, to do so. B, a shoemaker, measures A's feet and the boots, and testifies that a foot of the size of A's can wear the boots. C and D put them on, in the presence of the jury, and B, after measuring their feet, testifies that they are as large as A's. A is convicted. The question is, whether allowing the experiments in the presence of the jury, and admitting B's testimony, constitute prejudicial error.

The experiment and evidence are both proper.[5]

3—Elgin, J. & E. Ry. Co. v. Reese, 70 Ill. App., 463. See also 32 Ill. App., 196.

4—People v. Levine, 85 Cal. 39. See also Sullivan v. Com., 93 Pa. St., 297; State v. Asbell, 57 Kan. 398.

5—State v. Nordstrom, 7 Wash. 506.

6. A is on trial for the murder of B, who was found dead with a bullet hole through her body and a pistol near by. A claims that B committed suicide. There were no powder marks on B's clothing or person. The state, against objection, is permitted to put in evidence the result of experiments made with the pistol found near B's body, by discharging the pistol, at various distances, into a piece of cloth of the same kind of which the only garment B had on was made (muslin). The witnesses who made the experiments are also allowed, against objection, to express opinions, founded upon the experiments, that B could not have held the pistol herself without some trace of powder stain or burn upon the garment she wore when shot. A is convicted. The question is, whether the rulings of the court are prejudicial error.

The rulings of the court are not prejudicial error. Evidence of the experiments, as well as of the opinions, is admissible.[6]

7. A is on trial for the murder of B. The evidence tends to show that B was killed with low-mould buckshot. As a circumstance which tends to show that B was shot with a gun belonging to A, evidence is put in to the effect that this gun scatters low-mould buckshot "badly." A introduces evidence that the gun does not scatter such shot, and requests the permission of the court to take the gun out and shoot it off in the presence of a deputy marshal, to test the mater; but the court refuses the request. A is convicted. The question is, whether the court's refusal is prejudicial error.

The court's refusal is not prejudicial error. "The granting or refusal of such request, first made in the midst of the trial, was clearly within the discretion of the court."[7]

8. A is indicted under a statute which prohibits the sale of intoxicating liquor, and which provides that any beverage containing more than one per centum of alcohol shall be deemed intoxicating. He offers, against objection, evidence of experiments to show that the liquor is not in fact intoxicating, but

6—Boyd v. State, 14 Lea (Tenn.), 161. See also Thrawley v. State, 153 Ind., 375.

7—United States v. Ball, 163 U. S. 673.

the court excludes it, and he is convicted. The question is, whether the court's ruling is prejudicial error.

The court's ruling is not prejudicial error. The evidence offered tended to show an immaterial fact. The material question is, whether the liquor contains one per centum of alcohol, and not whether it is in fact intoxicating if taken in small quantities.[8]

9. A is indicted for arson. The court allows evidence of an experiment with candles to ascertain how long they would burn. The question is, whether the court's ruling is error.

Assuming that the evidence is material to the issue, the court's ruling is correct.[9]

10. A is on trial for maliciously shooting B. B testifies to his position and attitude in the parlor of a tavern the night he was shot at, and to the identity of A as the person who shot at him, as seen through a glass window by the light of the pistol's flash. The state, against objection, is allowed to prove experiments and observations, made subsequently at the same place, by several witnesses who were not present at the shooting, for the purpose of showing that B might or could have seen and recognized A when the alleged crime occurred. A is convicted. The question is, whether the court's ruling is prejudicial error.

The court's ruling is not prejudicial error. The evidence offered is material to the question of A's identity.[10]

11. A is on trial for murder. The court compels him to make footprints in an ash heap. The footprints correspond with tracks discovered at the scene of the crime. A is convicted. The question is, whether the court's ruling is prejudicial error.

Some courts allow this kind of evidence.[11] Other courts reject it on the ground that, to admit it the witness is compelled to furnish evidence against himself.[12]

8—Com. v. Brelsford, 161 Mass. 61. See also Libby v. Scherman, 146 Ill., 540; Ulrich v. People, 39 Mich. 253.

9—People v. Levine, 85 Cal. 39.

10—Smith v. State, 2 Ohio St., 512.

11—Walker v. State, 7 Tex. App., 245, 32 Am. Rep. 595.

12—Stokes v. State, 5 Baxt. (Tenn.), 621, 30 Am. Rep., 72.

12. A is on trial for assault with intent to commit rape. Evidence is introduced that he was in a wagon in the rear of three other wagons, and that, after the commission of the alleged offense, he overtook these three wagons. To rebut this evidence, A offers, against objection, evidence of experiments by him tending to show that it would have been impossible for him to have stopped and committed the offense as shown by the state and then to have overtaken the three wagons; but the court excludes the evidence. A is convicted. The question is, whether the court's ruling is prejudicial error.

The court's ruling is prejudical error. "Upon principle and authority, this character of testimony, where the experiment appears to have been made under conditions similar, or nearly similar, to those which attended the original transaction, and where such experiments would tend to shed any light upon said original transaction, is admissible."[13] Some cases, however, exclude such evidence.[14]

13—Clark v. State (Tex.), 40 S. W. R. 992, 995. See also Wilson v. State (Tex.), 36 S. W. R., 587; People v. Levine, 85 Cal., 39; State v. Asbell, 57 Kan., 398; Sullivan v. Com., 93 Pa. St., 284.

14—Evans v. State, 109 Ala., 11; Hooker v. State (Md.), 56 Atl. Rep. 390; State v. Fletcher, 24 Ore., 295.

ILLUSTRATIONS ON PROOF OF AUTHORSHIP.

1. A, who holds a mortgage on B's farm, sues him in ejectment. A offers in evidence the mortgage deed which is attested by C, and having subpoenaed B asks him if he executed the deed. B objects to the question on the ground that C has not been called to testify. The court rules that C must first be called, and nonsuits A. The question is, whether the court's ruling is correct.

According to the English common law the court's ruling is correct. The two reasons which have been assigned for this rule are, (1) The parties to the writing impliedly agree that proof of their signatures shall be made by the subscribing witness; and (2) Each of these parties is entitled to have an opportunity to cross-examine this witness if available.[1]

2. A sues B on a bond attested by two witnesses, one of whom is dead and the other beyond the sea. The court rules that the handwriting of the dead witness may be proved, and that it is not essential to prove the handwriting of the obligor. Judgment is entered for A. The question is, whether the court's ruling is correct.

The court's ruling is correct. The handwriting of the attesting witness when proved is evidence of everything on the face of the bond, and the handwriting of the obligor need not be proved.[2]

3. A sues B on an attested indenture or apprenticeship which is in the hands of B. A asks B to produce the indenture but B refuses. A then offers secondary evidence of its contents and B objects to this evidence on the ground that the attesting witness has not been called. The question is, whether or not the secondary evidence is admissible.

This evidence is admissible. Since the indenture is in the hands of the defendant, if he wishes to throw on the plaintiff the burden of calling the subscribing witness he must produce the instrument.[3]

4. A seeks to probate B's will. Each of the two attesting witnesses testifies to the genuineness of his signature, but each

1—Whyman v. Garth, 8 Exch. 803.

2—Adam v. Kers, 1 B. & P. 360.

3—Cooke v. Tanswell, 8 Taunt. 450.

testifies that he has no recollection of signing the attestation clause, or of seeing the deceased sign the will, or that the deceased ever acknowledged the same to be his act or deed. The county court refuses probate of the will and an appeal is taken to the circuit court. The question is, whether or not the order of the county court should be sustained.

The order of the county court should not be sustained. "If the attestation clause is full and the signatures genuine and the circumstances corroborative of due execution, and no evidence disproving a compliance in any particular, the presumption may be lawfully indulged that all the provisions of the statute are complied with, although the witnesses are unable to recollect the execution or what took place at the time."[4]

5. A sues B in ejectment. B offers in evidence an attested lease of the premises made by A to C. The attesting witness is not called, but A and C waive their right to insist on producing him, and acknowledge the execution of the lease. The court, however, excludes the lease on the ground that the attesting witness is not called. Judgment is rendered for A. The question is, whether the court's ruling in excluding the lease is prejudicial error.

The court's ruling is prejudicial error. "The rule which requires that the attesting witness to a written instrument shall be called to prove its execution, if within the State, has no application to a case where both parties to the instrument are in court and waive their right to insist on producing such witness."[5] Some decisions, however, hold the contrary.[6]

6. A sues B in tort for the conversion of certain chattels. He alleges in his declaration that B, by false and fraudulent representations, induced him to exchange certain chattels for a parcel of land, of which B delivered to him an invalid deed. The ques-

4—Thompson v. Owen, 229, 235; Matter of will of Kellum, 52 N. Y. 517; Jarman on Wills (6th ed.) 123, 124; Abbott v. Abbott, 41 Mich. 540. (In this case Chief Justice Campbell says, "But we know of no rule of law which makes the probate of a will depend upon the recollection, or even the veracity, of a subscribing witness.")

5—Forsythe v. Hardin, 62 Ill. 206.

6—Brigham v. Palmer, 3 Allen (Mass.) 450.

tion is, whether the deed is admissible in evidence without proving its execution by the attesting witness.

Since the deed is not in issue, but comes into the case collaterally, it is admissible in evidence without proving its execution by the attesting witness.[7]

7. A sues B on a judgment rendered in another state. He offers in evidence a document purporting to be a copy of the record of the court that rendered the judgment, the attestation of which is signed "A. M. Callaghan, Clerk District Court, by J. F. Curtis, Dep. Clerk." It is also signed by the judge of the court, who certifies that A. M. Callaghan is the clerk of the court and keeper of the records and seal thereof at the time of the attestation, and that the certificate is A. M. Callaghan's handwriting and that the attestation is in due form and made by the proper officers. The question is, whether the attestation complies with the requirements of the act of Congress; and if not, whether the defect is cured by the certificate of the judge that the attestation was made by the proper officers.

The attestation does not comply with the requirements of the act of Congress since it was not signed by the clerk. Nor is the defect cured by the certificate of the judge that the attestation was made by the proper officers since all he could certify to was that the attestation was in due form.[8]

8. A sues B in an action *quare clausum fregit.* He offers in evidence, against objection, a deed which is not acknowledged, after accounting for the absence of the subscribing witness, and after introducing some evidence tending to show that his handwriting could not be proved, and evidence establishing the signature of the grantor. The question is, whether the deed is admissible.

At the English common law a technical and artificial rule obtained which made proof of the handwriting of a subscribing witness better evidence than that of the parties to the instrument. This rule has met with much dissatisfaction. In Eng-

7—Skinner v. Brigham, 126 Mass. 132. See also, Curtis v. Belknap, 21 Vt. 433; Rand v. Dodge, 17 N. H. 343.

8—Willock v. Wilson, 178 Mass. 68.

land,[9] and in some of the states,[10] it has been modified by statutes, and in other states it has been repudiated, except in the case of writings which the law requires to be attested by witnesses. Since the deed A offers in evidence did not require to be attested, it is admissible in evidence without proving the handwriting of the subscribing witness.[11]

9—The Common Law Procedure Act of 1854 (17 & 18 Vict., chap. 125, sec. 26) contains the following provision: "It shall not be necessary to prove by the attesting witness any instrument, to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto."

10—Such statutes have been passed in Massachusetts, New York, Michigan, Illinois, Pennsylvania, Maryland, Rhode Island, and perhaps in other states. The Massachusetts statute, passed in 1897, provides as follows: "It shall be competent to prove the signature to any attested instrument or writing, except a will, in the same manner as if such instrument were not attested."

11—Newsom v. Luster, 13 Ill. 175; Forsythe v. Hardin, 62 Ill. 206.

ILLUSTRATIONS ON ALTERATIONS OF WRITINGS.

1. A executes and delivers to B a negotiable promissory note for $2,270, with interest at ten per cent. The note also contains a promise to pay an attorney's fee of $3, a power of attorney to confess judgment, and a promise to pay an attorney fee of $3 for doing so. After the delivery of the note to B, and while in his possession, it is altered by changing the $3 in each case to $300. Before maturity, B indorses the note to C, a *bona fide* purchaser; and at maturity judgment by confession is entered against A. The question is, should the judgment be allowed to stand.

The judgment is absolutely void, and therefore should not be allowed to stand. A power of attorney to confess a judgment, which is materially altered while in the hands of the payee of the indebtedness, without any explanation of the alteration, is made void by such alteration, and a judgment entered by confession under it is also void. Where a promissory note, containing a promise to pay a certain sum as attorney's fee, is altered while in the hands of the payee, increasing the amount of such fee, the alteration will be presumed to have been made by him, and the note becomes thereby utterly void even in the hands of a *bona fide* indorsee.[1]

2. A executes and delivers to B a bond for the future conveyance to him of a piece of land. There is an oral agreement that B is to have immediate possession of the land, but the bond is silent on this point. B, without the knowledge or consent of A, adds to the bond words which purport that B is to have immediate possession of the land. The question is, whether the alteration avoids the bond.

The alteration is material and avoids the bond, even though it expresses the original intention of the parties. This is owing to the fact that it changes the legal effect of the instrument.[2]

3. A executes and delivers to B a deed of land. B subsequently discovers that in the description of the land the word "Vermont" is used instead of the word "Illinois," and at his

1—Burwell v. Orr, 84 Ill. 465. 2—Kelly v. Trumble, 74 Ill. 428.

request A strikes out the former word and inserts the latter. The deed refers to another recorded deed for a more particular description which is correct. The question is, whether the alteration vitiates the deed.

The alteration, under the circumstances, is immaterial and does not vitiate the deed.[3]

4. A as principal and B as surety execute and deliver to C a promissory note. Subsequently, C, with A's consent but without B's knowledge or consent, alters the note so as to make it draw interest a month sooner than before. The question is, whether B is released.

The alteration is material, and since the making of it is without B's consent he is released.[4]

5. A as principal and B as surety execute and deliver to C a promissory note for $500. When C receives the note he insists that it should include interest which has already accrued on the claim for which it is given; and C, in B's absence, and without his knowledge or consent, adds, immediately after the words "value received," the following expression: "$10 dollars and fifty interest." The question is, whether this alteration discharges B, the surety.

The alteration is not a material one and therefore it does not discharge B. The expression added would naturally be construed to mean that a part of the value received by the makers consists of ten dollars and fifty cents interest.[5]

6. A executes and delivers to B a so-called promissory note in payment of some fanning mills. The note is written in ink, except that it contains a condition written in pencil, as follows: "This note is not to be paid until fourteen mills are sold." This condition, while the note is in B's possession, is erased, leaving no trace of a pencil mark, or any indication of alteration. Subsequently, and before maturity, the note is assigned to C, an innocent purchaser for value. The question is, whether the alteration is a good defense in an action against A on the note.

The alteration, though material, is no defense. A, in signing

3—Sanitary District of Chicago v. Allen, 178 Ill. 330, 335.

4—Benedict v. Miner, 58 Ill. 19.

5—Gardiner v. Harback, 21 Ill. 129.

the note under the circumstances stated, is guilty of gross carelessness; and C, an innocent purchaser before maturity takes the note free from any defense arising from the alteration.[6]

7. A and B execute and deliver to C a joint and several note. B, as surety, pays the note, after which his name is cut off, and action on the note is brought in the name of the payee, for the use of B. At A's request the court instructs the jury "that if they believe, from the evidence, that the note has been altered, by cutting off the name of one of the makers since the same was executed, and without the knowledge or consent of the defendant, that they will find for the defendant." The question is, whether the instruction is correct, and what presumption, if any, arises where an instrument on its face appears to have been altered.

The instruction is correct. Where an instrument on its face appears to have been altered, the law presumes nothing; but leaves the question of the time when it was done, as well as that of the person by whom it was done, and the intent with which it was done, as matters of fact to be found by the jury; and it is incumbent on the party offering the instrument in evidence to explain the alteration.[7]

8. A executes a promissory note for $5,000, payable to B. Before delivery of the note to B, C and D indorse it. After delivery, B, with A's consent, but without the knowledge or consent of C or D, adds to the note the words "payable at 53 Lake street." The question is, whether the addition to the note discharges C and D.

The alteration is material and discharges the guarantors C and D.[8]

9. A sues B for breach of a building contract. The contract was executed in duplicate, and B offers in evidence the document kept by him. A objects to this document on the ground that after its delivery it was materially altered by changing the date of its performance, the contractual price and the times of payment. There is no dispute as to these alterations. The *narr.*

6—Harvey v. Smith, 55 Ill. 224.
7—Gillett v. Sweat, 1 Gilman 629.
8—Pahlman v. Taylor, 75 Ill. (Ill.) 475.

declares on the contract as originally drawn. The question is, what is the effect of these alterations?

The effect of the alterations depends upon whether or not they were made with A's consent, and if not, whether or not they were made with fraudulent intent. If a party to a written executory contract makes material alterations in it without the consent of the other party to it, he will be precluded from using it as evidence to enforce its provisions against that other party. The unauthorized material alteration of a written instrument by the holder, or with his consent, vitiates it as to non-consenting parties. Where a material alteration is made by the holder with fraudulent intent his act justly deprives him of all rights by virtue of it. The identity of the instrument is thereby destroyed, and courts will not assist persons who have been guilty of a fraud to carry out the transaction wherein it was perpetrated. A party who fraudulently destroys the evidenc of a debt agreed upon by the parties, should not be allowed to supply its place by other evidence.[9]

10. A sues B in ejectment. He offers in evidence, against objection, a deed which contains several material interlineations, and erasures. The question is, what presumptions, if any, exist in regard to them.

The mere fact of an interlineation or erasure appearing in an instrument does not, of itself, raise any presumption of law either for or against the validity of the writing. The question when, by whom, and with what intent, it was made, is one of fact for the jury to determine. This rule also obtains where any ground of suspicion is apparent upon the face of the instrument.[10]

11. A sues B on B's promissory note. While the note was in A's possession, the blank space left for the rate of interest was filled in with the figure "8," making the note read "with interest at the rate of 8 per cent per annum from date until paid." The question is, whether B is liable on the note.

B is not liable on the note. The alteration is material and avoids it in the hands of any person but a *bona fide* purchaser.[11]

9—Hayes v. Wagner, 89 Ill. App. 390.

10—Catlin Coal Co. v. Lloyd, 180 Ill. 398, 405. See also, Gillett v. Sweat, 1 Gilman (Ill.) 475.

11—Yost v. Minneapolis Harvester Works, 41 Ill. App. 556.

12. A files a bill against B to foreclose a mortgage. B defends upon the ground that the notes secured by the mortgage were altered, without his knowledge or consent, by adding to the name of the payee, the term, "& Co." The question is, whether such an alteration is a good defense.

Assuming that the alteration is material, whether or not it constitutes a good defense to A's bill depends upon the intent with which it was made. If it was made innocently it is no defense. If it was made fraudulently it is a good defense. A fraudulent alteration not only avoids the note, but prevents a recovery upon the original consideration. Adding the term "& Co." to the name of the payee was prejudicial to him, and did not change the liability of the maker of the notes. It is fairly inferable, therefore, that the alteration was not fraudulently made. It follows, therefore, that B's defense is not good. On the other hand, if the action were on the notes, assuming that the alteration is material the notes would be inadmissible, and the defense, therefore, would be good.[12]

13. A, the assignee of a promissory note, sues B, the maker, on it. B defends on the ground that after delivery of the note to the payee it was changed by raising the amount from $60.08 to $60.84. The face of the note bears unmistakable evidence of a change. The court refuses to instruct the jury "that when an instrument offered in evidence has the appearance of having been altered, the law raises no presumption as to when the change was made or by whom. These are questions of fact to be found by the jury; and in determining these questions the jury should look at the instrument itself, as well as to all the circumstances in evidence, for an explanation, and thus determine whether the alteration was made before or after the execution of the instrument, and whether such alteration was made with or without the consent of the defendant." The question is, whether the court's ruling is correct.

12—Elliott v. Blair, 47 Ill. 342. See also, First Nat. Bank of Springfield v. Ryan, 31 Ill. App. 271; Vogel v. Ripper, 34 Ill. 100; Horst v. Wagner, 43 Ia. 373, 22 Am. Rep. 255; Draper v. Wood, 17 Am. Rep. 92. (The note to this case contains a useful collection of authorities upon the subject in general.)

The instruction as requested is correct, and the court's ruling prejudicial error.[13]

14. A and B executed a promissory note for $4200, payable to the order of the First Nat. Bank. The makers and C agreed that the note was to be discounted by the bank, and the proceeds, plus the cost of discounting the note, turned over to C in payment of certain personal property purchased from him. The bank insisted that C guarantee the payment of the note and he signed his name just below the signatures of A and B, and the note was delivered to the bank and the money paid. Subsequently C went to the bank and had the cashier erase his signature on the face of the note as one of the makers, and had his name written in the note as payee. At the same time the cashier placed the bank's guarantee stamp on the back of the note which C signed. The bank now sues A and B on the note, and they defend upon the ground that the note was so altered after its execution, without their knowledge or consent, that they are discharged from all liability upon it. The question is whether their defense is good.

The answer to this question depends upon whether or not the alterations are material. To be material they must affect the legal rights of the parties. "And in no case is a change in the phraseology of the instrument material when it does not essentially change its legal effect."[14] As the note stood before the alterations were made, A and B were liable to the bank on the note. C's guaranty neither enlarged nor diminished the rights of the bank against them. The bank's rights and duties, as between it and them, were precisely the same after the alterations were made as before. Their defense, therefore, is of no avail.[15]

15. A, the indorsee of a bill of exchange, intentionally makes a material alteraton in it. The question is whether his act extinguishes the debt owing to him by the indorser.

The alteration not only avoids the security as against all prior parties, but it also extinguishes the debt owing by the

13—DeLong v. Soucie, 45 Ill. App. 234. See also Milliken v. Marlin, 66 Ill. 13.

14—Daniels on Neg. Instr., citing Holland v. Hatch, 15 Ohio St. 464.

15—Ryan v. First Nat. Bank, 148 Ill. 349.

indorser.[16] The reason for this rule is, "It would be unjust that the indorsee should compel the indorser to pay his debt when the indorsee has destroyed the instrument on which alone, in some cases, and on which preferably in all cases, the indorser should sue. To make the indorser liable on the consideration and give him a cross-action against the indorsee for the alteration, would be to oblige him to rely on the indorsee instead of the antecedent parties, and to prove a fact of which he might have no evidence. It would, besides, introduce a needless circuity of action."[17]

16. A, the assignee of a certificate of deposit, delivered to B by C, a banker, sues C upon the certificate. The certificate, as issued, contained the following words: "Payable thirty days after date, with —— per cent per annum." At the time the certificate was assigned to A, D, with B's consent, and in A's presence, fraudulently filled the blank by inserting the figures "10," thereby making the instrument on its face draw ten per cent interest instead of six per cent, the legal rate, B stating that C understood that the certificate should bear ten per cent interest, but that he neglected to insert it. The question is, whether C is liable.

Since the alteration is not only material but also fraudulent no action will lie against C either upon the certificate itself, or upon the original consideration for which it was given. "The original cause of action upon the account was lost by merger, and the circumstances under which the certificate became void were not such as to justify a court in holding that the original cause of action was revived by reason of the fact that the certificate became void."[18]

17. A brings ejectment against B relying upon a sheriff's deed. After receiving the deed A fraudulently changed the description of one of the parcels of land covered by it, but not the one he seeks to recover in this action. The court holds that the alteration vitiates the whole deed and rejects the deed as evidence. The question is, whether the court's ruling is prejudicial error.

16—Alderson v. Langdale, 3 B. & Ad. 660, 23 E. C. L. 155.

17—Wood's Bylaws on Bills and Notes 328. See also Chitty on Bills 221.

18—Woodworth v. Anderson, 63 Ia. 503.

The court's ruling is prejudicial error. The alteration in the deed does not effect the parcel of land sued upon, and therefore, as to this parcel the alteration is immaterial. Moreover, an alteration in a deed after delivery does not operate to reconvey the title to the grantor even when made fraudulently. The title passes by the deed, and its continued existence or integrity is not essential thereto, although a fraudulent and material alteration may disable the grantee from bringing an action upon its covenants.[19]

18. A, the payee of a negotiable promissory note, forges it before maturity by inserting the words "ten" and "date" whereby it is made to draw ten per cent interest from date. The question is, whether the forgery impairs the liability of a subsequent indorser to an innocent holder for value.

The alterations discharge the maker, but they do not affect the liability of a subsequent indorser to an innocent holder for value.[20]

19. A, on April 20th, drew his check on the W. S. Bank, dated April 22nd, payable to his clerk, C, and left it with C with directions to draw the money on the 22nd, if he did not return before noon, and give it to the foreman to pay off employees. C altered the date to the 21st, drew the money on that date and absconded. A did not return until after the time appointed. The question is, who has to stand the loss, A or the bank.

The bank has to stand the loss. The alteration was fraudulent and material. As originally drawn the check conferred no authority on the bank to pay it before the 22nd. The fraudulent alteration vitiated it before it had any inception. It was not, therefore, a legal obligation enforceable against the drawer by its holder. By reason of the unauthorized act of the bank in paying it, and thereby enabling the fraudulent holder to abscond with its proceeds, its object had wholly failed before the legally appointed time for its payment. "The relation existing between a bank and its depositor is, in a strict sense, that of debtor and creditor; but in discharging its obligation as a debtor

19—Woods v. Hilderbrand, 46 Mo. 284.

20—Washington Savings Bank v. Ecky, 51 Mo. 272.

the bank must do so subject to the rules obtaining between principal and agent."[21]

20. A files a bill to set aside a deed of 400 acres of land to his father, B. The bill alleges that A's mother executed the deed to him, that B took it to be recorded, and that while it was in B's possession he fraudulently erased A's name and inserted his own as grantee, and then had it recorded, after which it was lost. The question is, upon whom does the burden of proof rest?

The burden of proof rests upon A to establish the forgery by clear and convincing proof.[22]

21. A devised to B forty acres of land. A few weeks later he informed K, the executor named in the will, that he wished to alter the will so that C would take the forty acres instead of B. K, at A's request, thereupon cancelled B's name in the will by drawing lines through it with a pen, leaving the name still legible, and interlined over it C's name, so as to make the will read as a devise of the forty acres to C. The two witnesses who attested the will as it originally read were not present when the alteration was made, nor was the will ever republished. The question is, who is entitled to the forty acres of land devised?

The land devised goes to B. The will as altered should have been republished and attested by two witnesses in A's presence. Every act of cancellation imports *prima facie* that it is done with intent to revoke, but accompanying circumstances may rebut this presumption. A's intent was not merely to revoke the devise to B, but also to substitute in her stead C. The cancellation was but a means to an end, viz: the substitution of C; and the ultimate end having failed the means to that end also failed. "It is well settled by the authorities, that where the testator makes an alteration in his will, by erasure and interlineation, or in any other mode, without authenticating such alteration by a new attestation in the presence of witnesses, or other form required by statute, it is presumed that the erasure was intended to be dependent upon the alteration going into effect as a substitute; and such alteration not

21—Crawford v. West Side Bank, 100 N. Y. 50, 53 Am. Rep. 152.

22—Oliver v. Oliver, 110 Ill. 119. See also to the same effect Blasey v. Delius, 86 Ill. 558.

being so made as to take effect, the will, therefore, stands in legal force, the same as it did before, so far as it is legible after the attempted alteration."[23]

22. A executes his will in which certain legacies are bequeathed to B and various other persons. After the will is executed, some person, other than A, makes a change in the will by which one of the legacies to B is materially modified. The question is, what is the legal effect of the alteration?

The legal effect of the alteration depends upon who makes it. If made by a stranger it has no legal effect. If made by B it avoids that particular bequest, but not others made to B. In any case the legal effect of the alteration is confined to the bequest to which it relates. As said by Justice Story, "If the interlineation, etc., be made by a stranger, and the original legacy be known, it will have no legal effect, and the legacy will be still recoverable, and ought to be proved as it originally stood. If made by the legatee himself, at most *in odium spoliatoris* it will only avoid the legacy so altered, but it cannot destroy other bequests in the will, either to the legatee himself or to others. This is not like the case of a contract where the alteration of a security by the obligee himself avoids it. The legatees all take by the bounty of the testator; the object is to carry his will into effect, and not merely to attend to the merits or demerits of those who claim under it. If any alteration in a will would avoid it, the executor before probate might, by such alteration, destroy the rights of all third persons, which would be in the highest degree unreasonable."[24]

23—Wolf v. Bollinger, 62 Ill. 368. See also Redfield on Wills, 314, 325, 327; Short v. Smith, 4 East, 417; Laughton v. Atkins, 1 Pick. (Mass.) 535.

24—Smith v. Fenner, 1 Gall. (U. S.) 170 (cited and followed in Doane v. Hadlock, 42 Me. 72). See also Camp v. Shaw, 52 Ill. App. 241; Jackson v. Malin, 15 Johns. (N. Y.) 293; Grubbs v. McDonald, 91 Pa. St. 236.

ILLUSTRATIONS ON PROOF OF CONTENTS AND THE BEST EVIDENCE RULE

1. A sues B on a contract for the sale of certain bank stock. The contract was executed in duplicate, each taking a counterpart. A makes affidavit "that his impression is that he tore up the same (his counterpart), after the transfer of the stock, believing that the statements upon which the contract had been made were correct, and that he would have no further use for the paper. He is not certain, that he did tear it up, and does not recollect doing so, but such is his impression. If he did not tear it up, it has become lost or mislaid; and that he has searched for it among his papers repeatedly, and cannot find it." B was given due notice to produce his counterpart but declines to do so stating that he has lost it. A thereupon offers oral evidence of the contents of the writing, by C, a subscribing witness. B objects to this evidence and the court sustains the objection; whereupon a verdict and judgment are given in B's favor. The question is, whether the court's ruling is prejudicial error.

The court's ruling is prejudicial error. "The general rule of evidence is, if a party intend to use a deed, or any other instrument, in evidence, he ought to produce the original, if he has it in his possession; but if the instrument be in the possession of the other party, who refuses to produce it, after a reasonable notice, or if the original be lost or destroyed, secondary evidence, which is the best the nature of the case allows, will, in that case be admitted. The party, after proving any of those circumstances, to account for the absence of the original, may read a counterpart, or if there be no counterpart, an examined copy, or, if there should not be an examined copy, he may give parol evidence of the contents."

Where a writing has been fraudulently destroyed or lost secondary evidence of its contents is inadmissible; but where the destruction or loss (although voluntary) is occasioned by accident or mistake, such evidence is admissible.[1]

2. A petitions the court for the initial registration of her

1—Riggs v. Taylor, 22 U. S. 483.

title to a certain lot. She offers in evidence an abstract of title showing the record of conveyances which are indispensable links in her chain of title. This evidence is objected to on the ground that no foundation has been laid for the introduction of such evidence. The objection is overruled, the evidence admitted and the petition granted. The question is, whether the court's ruling is prejudicial error.

The court's ruling is prejudicial error. The originals of the deeds mentioned in the abstract should have been produced, or their absence properly accounted for.[2]

3. A files a bill to have a certain quitclaim deed declared void and his title quieted. To establish his title, A offers in evidence a letter-press copy of an abstract of title of the property. This evidence is objected to on the ground that it is secondary evidence and no foundation has been laid for its introduction. Under the Burnt Record Act abstracts of title are made admissible. The court overrules the objection and admits in evidence the letter-press copy. The question is, whether the court's ruling is erroneous.

The court's ruling is erroneous. "A letter-press copy is not an original. It in no wise differs from any other accurate copy than the mode in which it is made; and it can be used in the place of an original in no case where a proved copy, made in another manner, would not be equally admissible."[3]

4. A sues the B Ry. Co. to recover damages for causing C's death. The question is, whether stenographic notes of the testimony taken by a person present at the coroner's inquest are admissible to contradict a witness at the trial.

The stenographic notes are inadmissible. The best evidence of such testimony is the deposition itself.[4]

5. A sues B for merchandise sold and delivered. A's bookkeeper is allowed, against objection, to give oral evidence of the contents of A's ledger and judgment is entered for A. The question is, whether the court's ruling is prejudicial error.

2—Gloss v. Hallowell, 190 Ill. 65.

3—King v. Worthington, 73 Ill. 161, 163. See also Foote v. Bentley, 44 N. Y. 169.

4—Overtoom v. Chicago & E. I. Ry. Co., 181 Ill. 323.

The court's ruling is prejudicial error. Assuming that A's ledger is a book of original entry it is the best evidence of its contents, and if available it should be produced.[5]

6. A files a bill against B to quiet title, and to have a certain bond cancelled. The evidence shows that B fraudulently altered the bond after its delivery to him by A, and the question is, whether this fact renders parol evidence of the contents of the bond admissible.

The fraudulent alteration of the bond by B renders parol evidence of its contents admissible on behalf of A.[6]

7. A, an employee of a sub-contractor, sues the owner of the building in process of construction, the contractor, and the sub-contractor, to recover damages for personal injuries received. For the purpose of showing the relation of the defendants to each other, the contract and specifications between the owner of the building and the contractor are offered in evidence and admitted against objection. The question is, whether the court's ruling is erroneous.

The court's ruling is correct. The contract and specifications constitute the best evidence of the relation existing between the defendants.[7]

8. A and others file a bill to determine the rights of the parties to certain bonds. The question is, whether a copy of a certain writing, which copy is attached to a written contract in evidence, and which is made a part of that contract, is admissible without first accounting for the loss of the original.

The copy is admissible as original evidence. When two persons enter into a written contract, and attach thereto a copy of another writing relating to the subject-matter of the contract, such copy may be regarded as a part of the written contract, and is admissible as original evidence.[8]

9. The fact in issue is whether the city council passed a certain ordinance providing for a special assessment; and the

5—Schotte v. Puscheck, 79 Ill. App. 31.

6—Kelly v. Trumble, 74 Ill. 428.

7—The Pioneer Construction Co. v. Howell, 189 Ill. 123.

8—Comer v. Comer, 120 Ill. 420, 430.

question is, whether the certificate of the city clerk is admissible to prove this fact.

The certificate is admissible, and constitutes *prima facie* evidence of the fact.[9]

10. A sues B for damages for false imprisonment. The question is, whether parol evidence, by the justice of the peace who issued the warrant for A's arrest, that a written affidavit was made before him upon which the warrant was issued, is admissible.

The parol evidence is admissible to show the fact that an affidavit *was made* but not to show *its contents*.[10]

11. The fact in issue is, who is the administrator of a certain estate; and the question is, whether parol evidence is admissible to prove this fact.

Since the fact in issue is a matter of record, the record itself is the best evidence of it. It follows, therefore, that parol evidence is inadmissible to show it, unless a proper foundation has been laid for its introduction by accounting for the nonproduction of the original.[11]

12. A sues B to recover for services rendered. The question is, whether copies of certain telegrams, purporting to have been sent by B to A, and received by A from the telegraph company in the usual course of business, are admissible as primary evidence.

The copies are admissible as primary evidence, provided the telegraph company in transmitting the telegrams acted as the agent of B. If, however, the company acted as the agent of A they are secondary evidence of the messages received by the company from B. When the person to whom a telegram is sent takes the risk of its transmission, or is the employer of the company, the message delivered to the operator is the original, and must be produced as the best evidence; but when the person sending the message takes the initiative, so that the telegraph company is to be regarded as his agent, the original is the mes-

9—McChesney v. City of Chicago, 159 Ill. 223.

10—Ashley v. Johnson, 74 Ill. 392.

11—Williams v. Jarrot, 1 Gilm. (Ill.) 120.

sage actually delivered at the end of the line, and it is primary evidence of the contents of the message sent.[12]

13. A sues B for libel for writing and procuring the publication of a certain article in a newspaper. He offers in evidence, against objection, the printed article taken from the newspaper, and which is admitted to be substantially according to the manuscript furnished the publisher by B. The question is, whether the printed article is admissible.

The printed article is inadmissible. The original manuscript should be produced, or its non-production accounted for.[13]

14. A, the payee of B's promissory note, sues him on the note. A's agent testifies that the note, while in his possession, was either lost or picked from his pocket, and that it was not indorsed. The question is, whether this is sufficient evidence to let in secondary evidence of the contents of the note.

The evidence is not sufficient to render admissible the secondary evidence.[14]

15. A testifies that he instructed his office porter to destroy certain papers in his office, believing that they would be of no further use; and that he believes the porter did so, though he did not see him do it. The question is, whether A's evidence is sufficient to let in secondary evidence of the contents of one of the instruments directed to be destroyed.

The evidence is sufficient to let in the secondary evidence.[15]

16. A testifies that B left a certain contract with him for safe keeping, and that he has made diligent search for it among his papers and cannot find it. The question is, whether secondary evidence is admissible.

A's preliminary evidence is sufficient to render secondary evidence of the contents of the contract admissible.[16]

17. A files a bill to establish title in him to a certain farm.

12—The Anheuser-Busch Brewing Assoc. v. Hutmacher, 127 Ill. 652. See also Chisholm v. Beaver Lake Lumber Co., 18 Ill. App. 131.

13—Strader v. Snyder, 67 Ill. 404.

14—McMillan v. Bethold, Smith & Co., 35 Ill. 250.

15—Western Union Tel. Co. v. Kemp Bros., 55 Ill. App. 583.

16—Doyle v. Wiley, 15 Ill. 576.

The question is, whether secondary evidence is admissible to prove the contents of a certain unrecorded deed, upon proof that the deed was executed and delivered to the grantee, who subsequently handed it with other papers to the grantor to keep in his safe, and that after the latter's death the deed could not be found though diligent search was made for it among the papers of the deceased.

The preliminary proof of the loss or destruction of the deed is sufficient to justify the admission of the secondary evidence.[17]

18. B owned the wire on a certain line fence between his farm and A's, and B accused A of stealing it, using the words: "You damn Irishman! You stole my wire." A now sues B for slander. B offers in evidence, against objection, a copy of a written contract between himself and A's grantor concerning the line fence, and B testifies that he at one time had the original contract, that his children blurred it with ink, that he put grease on it to bring out the writing, that he made the copy now offered in evidence from it and threw the original away believing that it would be of no further use, and that he had searched for the original but could not find it. The question is, whether the copy is admissible.

The copy is admissible. The contract is collateral to the issue. A was not a party to it. Moreover, although B threw away the original voluntarily he did not do so with any fraudulent intent.[18]

19. A is indicted for maliciously killing a dog. The prosecuting attorney offers to show by parol evidence that the dog had been listed for taxation. A objects to this evidence on the ground that the tax list returned by the assessor is the best evidence of this fact. The question is, whether the parol evidence is admissible.

The parol evidence is admissible. "The rule which requires the production of written instruments in evidence has no application when the instrument is merely collateral to the issue, and where

17—Hawley v. Hawley, 187 Ill. 351. Ia. 547. See also, Steele v. Lord, 70 N. Y. 280.

18—Murphy v. Olberding, 107

the fact to be proved relates to a subject distinct to the writing."[19]

20. A sues B for breach of a contract contained in certain written orders and letters which had passed between them. After introducing in evidence the letters he had received from B, A offers to prove by parol evidence the contents of the letters sent by him to B. B objects to this evidence on the ground that no notice had been given him to produce the originals. The question is, whether the parol evidence is admissible.

The parol evidence is admissible. "Notice to produce is not necessary in case of a writing directly involved in the cause of action or defense, so that the nature of the action or the contents of the pleadings in effect give notice that it will be required."[20]

21. A sues B for breaking and entering his close. B alleges justification under color of title. A, against objection, is permitted to show by parol evidence payment of taxes on the land. The question is, whether the court's ruling is erroneous.

The court's ruling is not erroneous. Proof of the payment of taxes, like the payment of money in discharge of a debt, may be shown by parol evidence, although a receipt was given.[21]

22. A is indicted for high treason. The crown prosecutor offers in evidence a placard containing the printed words constituting the offense. A objects to the contents of the placard being shown, on the ground that no notice had been given him to produce the original manuscript. The question is, whether A's objection should be sustained.

A's objection should be overruled. The placards are in the nature of duplicate originals, and each is primary evidence of

19—Hewitt v. State, 121 Ind. 245. See also, Coonrod v. Madden, 126 Ind. 197.

20—Zipp v. Colchester Rubber Co., 80 N. W. Rep. 367 (So. Dak.).

21—Hinchman v. Whetstone, 23 Ill. 108 (orig. ed. page 185); see also, The King v. Inhab. of Holy Trinity, 7 B. & C. 611. (In this case Justice Bayley says: "The general rule is, that the contents of a written instrument cannot be proved without producing it. But, although there may be a written instrument between a landlord and tenant, defining the terms of the tenancy, the fact of tenancy may be proved by parol, without proving the terms of it. It was unnecessary in this case

the contents of the rest.[22] "Where a number of documents are all made by printing, lithography, or photography, or any other process of such a nature as in itself to secure uniformity in the copies, each is primary evidence of the contents of the rest."[23]

to prove by the written instrument, either the fact of tenancy or the value of the premises.")

22—Rex v. Watson, 2 Starkie 116.

23—Stephen on Evidence, p. 103.

ILLUSTRATIONS ON THE PAROL EVIDENCE RULE.

1. A borrows money of the L. Ins. Co. and gives an unconditional promissory note therefor, payable to the order of B, who, at the same time, indorses it to the company for the accommodation of A. B is sued on the note by the company, and B offers in evidence, by way of defence, an oral agreement between himself, the company and A, made when the note is given and indorsed, that such sum as should be found justly due from the company to A, on a certain policy of insurance made by them to him, should be set off and applied in or towards the satisfaction of the note. The company objects to this oral agreement being introduced in evidence, and the question is, whether it is admissible or not.

The oral agreement is inadmissible. "The general principle, that oral testimony is inadmissible to contradict, vary or explain a written contract, is too familiar to require the citation of authorities."[1]

2. The A Bank loans the B. Ry. Co. a large amount of money and takes its promissory note in which the rate of interest specified to be paid is six per cent. at maturity, the Ry. Co. pays the note according to its terms. The Bank then sues the Ry. Co. for an additional two and one-half per cent. "commission," based upon an oral contract, made at the same time and upon the same consideration as the note. The question is, whether parol evidence, against objection, is admissible to prove the oral contract.

The parol evidence is inadmissible. "Where a loan of money and its terms are evidenced by a promissory note which has been paid and satisfied, the payee of the note can not recover a further sum upon a parol contract made at the same time the note was given, and upon the same consideration, for the reason, a recovery would necessarily involve the admission of evidence of a contemporaneous parol contract."[2]

3. A sells, assigns and delivers to C, for an agreed consideration in money, certain notes and mortgages of B, and all his

1—St. Louis Perpetual Ins. Co. v. Homer, 50 Mass. 39, 40.

2—U. N. Bank of Chicago v. L. N. A., etc., Ry. Co., 145 Ill. 209.

interest in a contract for the sale of certain land by him to B, the assignment being in writing under seal, executed by A alone, and containing a statement of the consideration, and stipulations for the security of A, and as to the effect of a default by B to make the payments therein specified. The question is, whether B can prove a contemporaneous oral agreement, by which, in case the timber on the lands described in the contract should fall short of a certain amount he is to be allowed at a certain rate per M. for the shortage.

The oral agreement is inadmissible. The written contract is complete, and parol evidence is inadmissible to vary or contradict it.[3]

4. A sells B a tract of land as containing 140 acres, at a given sum per acre, and delivers to B a deed of the same. B gives A his note, secured by a deed of trust, for the unpaid price, it being verbally agreed, before the executions of the writings, that if the land, on a survey, should contain more than 140 acres, B should pay A for such excess, and if it should fall short A should pay B for the deficit at the price per acre at which the land is sold. The tract contains more than 140 acres, and A sues for the value of the excess. The statute of frauds is not pleaded. The question is, whether parol evidence is admissible to prove the verbal agreement.

Parol evidence of the verbal agreement is admissible. "The general rule is well established that antecedent or contemporaneous parol agreements or declarations can not be received to contradict or vary the terms of a valid written agreement. This, however, does not forbid the contradiction by parol evidence of mere recitals as to the consideration of a deed where the party is not, on other principles, estopped to deny such recitals; nor does this rule forbid the establishment by parol of an agreement, although a deed and notes may have been executed in part performance of such parol agreement. In such case the verbal agreement remains an integer in full force, and may be proved by parol, unless the parol proofs tend to vary or modify the terms and legal effect of the writings which have been made in part fulfillment of the original agreement. And the varying or contradiction of a recital in the writing as to the consideration

3—Hubbard v. Marshall, 50 Wis. 322.

on which it rests, or as to the receipt of the consideration, will not be regarded as varying or contradicting the terms or legal effect of such writing."[4]

5. A files a bill against B to reform a written contract, and for specific performance. The bill alleges that a written contract was entered into for the conveyance of a certain tract of land, in a certain section, township, and range, but that the tract was misdescribed as being in a quarter of the section to which B had no title, but had title to the tract intended to be conveyed, in another quarter of the same section. The question is, whether parol evidence is admissible to show the mistake in the discription of the property.

Where a bill is filed to reform a written contract by correcting a mutual mistake in describing the property sold, parol evidence is admissible.[5]

6. P and G execute a written contract, by the terms of which, P, in consideration of the after-expressed covenants of G, sells his office furniture and the good will of his medical practice to G; and G, in consideration of the sale and P's covenants, agrees to pay P $100. P sets up in practice in violation of the contract, and, in answer to G's bill for an injunction, alleges that the real consideration for his covenants is G's undertaking to purchase certain real estate at $1,400, and that G has repudiated his agreement. G demurs, and the question is, whether the demurrer should be sustained.

The demurrer should be sustained. The consideration alleged in the document is contractual, and for this reason parol evidence is inadmissible to contradict it. As a general rule, however, the consideration expressed in a writing may be varied or contradicted by parol evidence. "The reason generally given for the rule is, that the language with reference to the consideration is not contractual; it is merely by way of recital of a fact, viz., the amount of the consideration, and not an agreement to pay it, and hence such recitals may be contradicted." But, "where the contract is complete upon its face, a stipulation as to the consideration becomes contractual, and where there is either a direct

4—Ludeke v. Sutherland, 87 Ill. 481, 483.

5—McCornack v. Sage, 87 Ill. 484.

and positive promise to pay the consideration named, or an assumption of an encumbrance on the part of a grantee in a deed which becomes binding upon its acceptance, then the ordinary rules with reference to contracts apply; and the consideration expressed can no more be varied by parol than any other portion of the written contract."[6]

7. S sues the C. Ry. Co. for damages for personal injuries. The company answers, that for a consideration stated S has released and discharged it from all liability, as set forth in the following contract: "Know all men by these presents, that I, for and in consideration of the sum of thirty-one dollars and fifty cents, to me paid by the Chicago and Eastern Illinois Railroad Company, the receipt whereof is hereby acknowledged, do hereby release and forever discharge . . . (the said) railroad company from any and all liability for . . . (setting forth the claim for damages for personal injuries); and I do hereby agree that this release shall operate as a perpetual bar to any suit at law or otherwise which I or my heirs or . . . personal representatives may or can sustain by reason of the claim aforesaid." S replies that the alleged release was executed without consideration, and insists that the consideration, stated upon the face of the instrument, may be attacked by parol evidence; while the company insists that it may not be so attacked because the consideration so stated is contractual and is protected from attack by the rule that parol evidence can not be heard to contradict, vary or amend the terms of a written contract complete upon its face. The question is, whether parol evidence is admissible to show that the release was executed without consideration.

The consideration expressed in the release is not *contractual,* but constitutes merely a *recital of the amount* of the consideration; and for this reason parol evidence is admissible to attack it. "It includes no agreement to pay or assume any sum or liability. It may be considered apart from the obligations of the appellant, and its statement was not essential to the validity of such obligations, but it might have been established by parol."[7]

6—Pickett v. Green, 120 Ind. 584. See also, Conant v. National State Bank, 121 Ind. 323; Reisterer v. Carpenter, 124 Ind. 30.

7—Stewart v. Chicago, etc., Ry. and C. and I. C. Ry. Co., 141 Ind. 55, 59. See also, Levering v. Shockey, 100 Ind. 558.

8. H sues the I. Ry. Co. for damages for personal injuries. The company pleads a release, and H replies that the release is without consideration. The release obligates the company to pay a certain amount of money, "in addition to all fees and charges payable to physicians and St. Vincent's hospital for services and care rendered to said Houlihan on account of such injuries, which amount of fees and charges said company, as a part of said compromise, agrees to pay." The question is, whether parol evidence is admissible to show that the release is without consideration.

Since H's covenants of release were made in consideration of the company's agreement to pay certain fees and charges and a sum in cash, the consideration expressed in the instrument is contractual, and parol evidence, therefore, is inadmissible to vary or contradict it. The consideration on each side was the mutual covenants of the other, and, in the absence of fraud or mutual mistake, parol evidence should be excluded.[8]

9. A files a bill against B to have a deed *absolute* on its face declared a mortgage, and for foreclosure. B denies that the deed when given was intended as a mortgage, and claims that it was given upon an unconditional sale of the property and that the deed was intended to be absolute. The question is, whether parol evidence is admissible to show that the deed was intended as a mortgage.

Parol evidence is admissible. "The doctrine that a deed absolute on its face may be shown to be a mortgage is old and well established."[9]

10. A sues B to recover certain rents. The premises are described in the lease as being in the city of Chicago, "and described as follows, to-wit: the house known and numbered as No. ...., Thirty-second street." The question is, whether parol evidence is admissible to remove the uncertainty as to the identity of the property intended to be leased.

Parol evidence is admissible. "Extrinsic proof is always competent to identify the subject matter of a contract if necessary, and to admit it in no way violates the rule that parol testi-

8—Indianapolis Union Ry. Co. v. Houlihan, 157 Ind. 494, 508.

9—McMillan v. Bissell, 63 Mich. 66, 69.

mony is never admissible to contradict or vary the terms of a written contract."[10] "If the meaning of an instrument, by itself, is intelligent and certain, extrinsic evidence is admissible to identify its subjects or its objects."[11]

11. A sues B on a written contract. The contract provides that B was to render certain specified services, and "other services," to A; but does not indicate what the "other services" were to be. The question is, whether parol evidence is admissible to show what services B was to render A other than those specified.

Parol evidence is admissible to explain the incomplete contract by showing what the parties meant by the term "other services."[12] "Where an agreement in writing is expressed in short incomplete terms, parol evidence is admissible to explain that which is *per se* unintelligible, such explanation not being inconsistent with the written terms."[13]

12. A files a bill in equity to reform a certain bond and to enjoin B from suing him at law for the alleged breach of this bond, in which A had bound himself to convey to B 280 acres of land, to be selected by B from a list of lands described in the bond itself, and which made no reference to any other paper for their identification. The question is, whether parol evidence is admissible to prove an oral contract between A and B that B was to select his land from tracts described in a registered certificate of purchase.

Parol evidence is not admissible to prove the oral contract. "It is a general rule of law, that when parties have deliberately put their engagements in writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing."[14] "The foundation of the rule in which parol evidence has been holden inadmissible, is in

10—Bulkley v. Devine, 127 Ill. 406, 409.

11—2 Parsons on Contracts, 564.

12—Scott v. Schnadt, 70 Ill. App. 25.

13—Razor v. Razor, 142 Ill. 375; 1 Greenleaf on Evid., § 282; 2 Wharton on Evid., § 1026.

14—Emery v. Mohler, 69 Ill. 221, 226; Merchants' Ins. Co. v. Morrison, 62 Ill. 242.

the general rules of evidence, in which writing stands higher in the scale than parol testimony; and when treaties are reduced into writing, such writing is taken to express the ultimate sense of the parties, and is to speak for itself. Indeed, nothing is so familiar as this idea."[15] A party can no more vary the terms of a written parol contract in a court of equity than in a court of law.[16]

13. A files a bill in equity to correct a mistake in the description of the subject-matter of a deed. The scrivener by mistake inserted in the deed, "east half of the north-west quarter of section 17," when the grantor and grantee intended to insert in the deed, "east half of the north-east quarter of section 17." The question is, whether parol evidence is admissible to show the mistake.

Parol evidence is admissible to show the intention of the parties with the view of correcting the mistake.[17] "We must therefore treat the cases in which equity affords relief, and allows parol evidence to vary and reform written contracts and instruments upon the ground of accident and mistake, as properly forming, like cases of fraud, exceptions to the general rule, which excludes parol evidence, and as standing in the same policy as the rule itself."[18]

14. Co. A, which claims a patent upon a certain invention, gives Co. B a license to manufacture under the patent upon payment by the latter company of a certain royalty, the contract providing that in case of any subsequent licenses being granted at a less royalty, Co. B should pay such reduced rate. Co. B now files a bill in equity to enforce the contract. The question is, whether parol evidence is admissible to show a subsequent written contract of settlement between Co. A and a third party, which on its face appears to be a grant of a license free of royalty, in payment of the price for certain other patents transferred to the licensor, is but a contrivance and device to cover up and conceal the fact of a grant of a license without royalty, or at a reduced rate.

15—Lord Chief Baron Eyre in Davis v. Symonds, 1 Cox 402.

16—Gibbons v. Bressler, 61 Ill. 110.

17—Ewing v. Sandoval Coal & Mining Co., 110 Ill. 290, 292.

18—Story's Equity Juris., § 156.

Parol evidence is admissible for the purpose stated. "Strangers to a written instrument, when their rights are concerned, are at liberty to show, by parol evidence, that the contract of the parties is different from what it purports to be on the face of the writing."[19] And the rule that parol evidence is not admissible to vary the terms of a written contract is not applicable to a suit between one of the parties to it and a third person.[20]

15. A sues B to recover damages for breach of the following agreement: "I have this day bought of Sam. Marshall for John Gridley, from 90 to 100 hogs, to be taken the first of January, at eight dollars per hundred, live weight. I am to take one car the first of December if I like—which he has received one hundred dollars." The agreement is signed and dated. The question is, whether parol evidence is admissible to fix the place of delivery of the hogs, and also to show their identity.

Parol evidence is admissible for the latter purpose, but not for the former one. "It is a rule of uniform application, that parol or other extrinsic evidence may be resorted to, for the purpose of identifying the property sold. Nor does such evidence infringe upon the other rule, that a written agreement cannot be contradicted, enlarged or varied by parol." But, "in so far as oral evidence was admitted to fix the place of delivery of the hogs, the court erred."[21]

16. A sues B on his promissory note. The question is, whether parol evidence is admissible to exonerate B by showing that he signed the note as C's agent with A's knowledge and consent.

The parol evidence is inadmissible. "On the face of the instrument signed by defendant, his undertaking is absolute; and to permit him to show by oral testimony that in no event was he to incur any personal liability by the writing, would be to contradict and vary the terms of his positive written agreement." It is to be observed, however, that, "It seems to be settled, so far as there is any well defined rule on this subject, that where a party signs his name as cashier or agent for a banking, railroad

19—The Wasburn & Moen Manuf. Co. v. The Galvan. Wire Fence Co., 109 Ill. 71, 79.

20—Needles v. Hanifan, 11 Ill. App. 303.

21—Marshall v. Gridley, 46 Ill. 247, 250, 251.

or other corporation, in drawing drafts and bills, or in accepting drafts or other evidences of indebtedness, in its ordinary business, if it appear it was the obligation of the corporation, and the cashier or agent had authority to bind the corporation, he is not personally liable, and the facts may be shown by extrinsic evidence. Commercial usage regards such paper as the obligation of the corporation, and not of the agent issuing it."[22]

17. Bank N sues B, the maker, on his prommissory note, of the following tenor:

"$3500. Boston, Dec. 9, 1903.

Five months after date, I promise to pay to the order of O. C. Hale, Esq., cashier, thirty-five hundred dollars; payable at either bank in Boston, value received.

(Signed) J. W. Baldwin."

The note is without any indorsement by Hale, the person named therein as payee, and B contends that the note declared on is not admissible in evidence under the declaration, not having been indorsed. The question is, whether parol evidence is admissible to show that Hale was in fact cashier of the bank, and that in taking the note he acted as its agent and cashier.

The parol evidence is admissible. "It is clear that evidence may be received to show that a note given to the cashier of a bank was intended as a promise to the corporation, and that such evidence has no tendency whatever to contradict the terms of the instrument."[23]

18. A and other obligees sue B on his bond. The bond describes the obligees as "Board of Trustees of Township No. 5, Range No. 9," omitting the name of the county. B contends that on the face of the bond there is such patent ambiguity as to avoid it, and that this ambiguity cannot be aided by averment. The question is, whether parol evidence is admissible to show the county.

Parol evidence is admissible to prove the county. "Looking

22—Hypes v. Griffin, 89 Ill. 134, 136. See also, Little v. Bailey, 87 Ill. 239; Trustees, etc. v. Rantenberg, 88 Ill. 219 and note.

23—Baldwin v. Bank of Newbury, 1 Wall. (U. S.) 234. See also, La Salle Nat. Bank of La Salle v. Tolu Rock and Rye Co., 14 Ill. App. 141.

at this instrument alone, it cannot be said that it would convey the notion that there is more than one township to which the description given could refer. It is only when we consider in connection with it the map of the state, and note the fact that townships may be north or south of base lines, and east or west of principal meridians, and that the boundaries of Illinois would include several townships, 5, 9, that ambiguity is manifest. It is *dehors* the deed, is latent, and may be 'holpen by averment.' "[24]

19. A made a devise to "the four boys." At the time of making his will, A had seven sons, four of whom were minors, living with him, the other three being married and having families of their own. The question is, whether parol evidence is admissible to show which four sons were intended.

The parol evidence, including declarations of intention made by A, is admissible. "It is said this is a patent ambiguity, and it is only latent ambiguities which can be explained by parol proof. We do not think so. Take the will upon its face, and the inference would naturally be that the testator had but four sons, and there is, therefore, on the face of the will, no ambiguity. It is only from proof *aliunde* there were seven sons, that any ambiguity is made apparent. In such case, the circumstances under which the words were used may be proven, to enable us to determine what meaning is to be given to the words, as used."[25]

20. A devised to his son B "twenty acres off the west half of the north-east quarter of the north-east quarter of section 33, township 18 north, range 11 west." The evidence shows that A never owned the north-east quarter of the north-east quarter of this section 33, or any part of it, but that he did own the north-west quarter of the north-east quarter of this section. The question is, whether parol evidence is admissible to show A's intention to devise to B the latter tract.

In this case, the maxim, *falsa demonstratio non nocet*, is applicable. After the false description is excluded, sufficient remains, interpreted in the light of surrounding circumstances

24—Trustees of Schools v. Rodgers, 7 Ill. App. 33, 37, 38. See also, 1 Greenleaf on Evid., § 297.

25—Bradley v. Rees, 113 Ill. 327, 333.

when the will was made, to identify the premises. The parol evidence, therefore, is admissible.[26]

21. A, in devising a lot to his brother H, used the following words: "I bequeath and give to my dearly beloved brother, Henry Walker, forever, lot numbered six, in square four hundred and three, together with the improvements thereon erected, and appurtenances thereto belonging." A never owned lot number 6, in square 403, but did own lot number 3, in square 406. The former lot had no improvements, while the latter one had a residence on it. The context of the will shows that A believed that in it he had disposed of all his property. The question is, whether parol evidence is admissible to explain and correct the mistake.

In this case also the maxim, *falsa demonstratio non nocet,* is applicable. Where the misdescription can be struck out, and sufficient remain in the will to identify the subject-matter, the court will deal with it in that way.[27]

26—Decker v. Decker, 121 Ill. 341. See also, Emmert v. Hays, 89 Ill. 12; Riggs v. Myers, 20 Mo. 299.

27—Patch v. White, 117 U. S. 210. To the same effect are, Willard v. Darrah, 168 Mo. 660 (1902); Allen v. Lyon, 2 Washb. C. C. 472; Townsend v. Downer, 23 Vt. 225; Winkley v. Kaime, 32 N. H. 268.

ILLUSTRATIONS ON COMPETENCY OF WITNESSES.

1. The A Manuf. Co. sues the B Ins. Co. on two policies of fire insurance. The question is, whether W, a former stockholder and a present creditor of the plaintiff company, is a competent witness.

W is a competent witness even at common law. "A remote contingency, or the mere expectation of a benefit or payment, will not disqualify a witness. To render him incompetent, he must in the general have a legal interest in the event of the suit; and such interest should be certain, direct and immediate; as otherwise it goes to his credibility, and not to his competency. A general creditor will be competent, although he swears that he expects his prospects for the recovery of his debt will be increased by the recovery of a judgment in the particular suit.[1]

2. A sues the B. Ry. Co. for damages for killing his ox. The question is, whether P, who has no religious belief, but who acknowledges his amenability to the criminal law if he forswear himself, is a competent witness at common law.

P is not a competent witness at common law. "A person who has no religious belief, who does not acknowledge a Supreme Being, and who does not feel himself accountable to any moral punishment here or hereafter, but who acknowledges his amenability to the criminal law if he forswears himself, cannot become a witness."[2]

3. A is indicted for forgery. The question is, whether the fact that B, a material witness for the state, is a lunatic, excludes him *per se* as a witness.

The fact that B is a lunatic does not exclude him *per se* as a witness. If he is sensible to the obligations of an oath, and sane as to the facts concerning which he is called upon to testify, he is a competent witness.[3]

1—Ill. Mut. Ins. Co. v. Marseilles Mfg. Co., 1 Gilm. (Ill.) 236, 262.

2—The Cent. Mil. Tract R. R. Co. v. Rockafellow, 17 Ill. 541.

3—Coleman v. Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711. See also District of Columbia v. Armes, 107 U. S. 519.

4. A is indicted for murder. The question is, whether B, a boy five years of age, and who is a material witness in behalf of the state, is, as a matter of law, an incompetent witness.

B is not, as a matter of law, an incompetent witness. "That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former."[4] The competency of a child to act as a witness can not be measured by mere age. It must be determined by his apparent mental capacity.[5] And the fact that the child cannot be convicted of perjury is not decisive against his incompetency.[6]

5. A is on trial for assault with intent to commit rape. The question is, whether B, a deaf and dumb person, is competent to testify.

B's infirmity does not render him incompetent as a witness. Originally, a deaf and dumb person was presumed incompetent. This presumption, however, was not conclusive. According to the modern rule no such presumption exists. The mode of eliciting his testimony rests in the discretion of the court.[7]

6. A is on trial for murder. The question is, whether the intoxication of a witness at the time of the homicide renders him incompetent, or impairs his credibility.

Intoxication which falls short of stupor does not render a witness incompetent. If he has capacity of observation and powers of memory, he is competent. Such intoxication, however, may impair his credibility. "While it must be admitted that intoxication does not destroy credibility, it undoubtedly impairs it. But, if the evidence of one who was intoxicated at the time of the occurrences of which he testifies is corroborated, or his

4—Wheeler v. United States, 159 U. S. 523, 524.

5—State v. Prather, 136 Mo. 20, 25. See, also, McGuire v. People, 44 Mich. 286.

6—Com. v. Robinson, 165 Mass. 426, 427. See, also, Featherstone v. The People, 194 Ill. 325.

7—Skaggs v. The State, 108 Ind. 54. See also, State v. Howard, 118 Mo. 127; Ritchey v. People, 23 Colo. 314, 47 Pac. Rep. 272.

recollection of the transactions appears to be distinct and clear, he is entitled to belief."[8] Confessions made by intoxicated persons have frequently been held admissible.[9]

7. A sues B, the executor of A's father, C, on C's promissory note to A. The question is, whether A's husband is a competent witness in her behalf.

A's husband is not a competent witness. "A husband or wife cannot testify for or against each other where the adverse party sues or defends as the executor or administrator of a deceased person."[10]

8. A is on trial for murder. The question is, whether B, who is jointly indicted with him for the same offence, but whose trial is severed from that of A's, may be examined as a witness in behalf of the state against his codefendant.

B is a competent witness. It is to be observed, however, that, "It is familiar knowledge that the old common law carefully excluded from the witness stand parties to the record, and those who were interested in the result; and this rule extended to both civil and criminal cases. Fear of perjury was the reason for the rule." But the old common law rule has been very much relaxed. "Confessedly, if separately indicted, he would be a competent witness for the government; but a separate trial under a joint indictment makes in fact as independent a proceeding as a trial on a separate indictment."[11] As said by Chief Justice Beasley, "The only reason for the rejection of such a witness is, that his own accusation of crime is written on the same piece of paper instead of on a different piece, with the charge against the culprit whose trial is in progress. It is obvious such a rule could only stand, in any system of rational law, on the basis of uniform precedent and ancient usage. I have discovered no such basis."[12] Some American decisions, however, hold the contrary. The leading case holding this view is The People v. Bill, 10 Johns. (N. Y.) 95. In this case the court say, "it appears to be a technical rule of evidence, and

8—State v. Castello, 62 Ia. 404, 17 N. W. R. 605.

9—State v. Grear, 28 Minn. 426; Com. v. Howe, 9 Gray (Mass.) 112; State v. Felter, 53 Ia. 49.

10—Mann v. Forein, 166 Ill. 446, 447.

11—Benson v. United States, 146 U. S. 325, 335.

12—State v. Brien, 32 N. J. Law.

one well settled, that a party in the same suit or indictment cannot be a witness for his co-defendant until he has been first acquitted, or, at least, convicted." The great weight of authority, however, is to the contrary.

9. A, who is B's brother, is one of the three subscribing witnesses to B's will. The statute provides that three attesting witnesses are essential to the validity of a will. Had B died intestate, A would have been entitled to one-fourth of her estate. Under the will, however, he gets nothing. Most of B's estate is bequeathed and devised to A's son. The question is, whether A is a competent witness in the probate of B's will.

A is a competent witness even at common law. "It is only when the pecuniary interest of a person will in some way and to some appreciable extent be aided or promoted by a judgment in favor of the party calling him, that he is excluded from testifying, according to the rule of the common law."[13] And Greenleaf says, "it is hardly necessary to observe that when a witness is produced to testify against this interest, the rule that interest disqualifies does not apply, and the witness is competent."[14] The test is an objective one. If the judgment might be used to the pecuniary or proprietary advantage of the witness, at common law he was incompetent.

10. A is on trial for murder. During the progress of the trial the presiding judge is called as a witness, and, against the objection of the defendant, testifies in behalf of the state. A is convicted. The question is, whether admitting the testimony of the presiding judge is prejudicial error.

Admitting the testimony of the judge is prejudicial error. Under the circumstances he is an incompetent witness.[15]

11. A is on trial for seduction, fornication and bastardy. For the purpose of impeaching the credibility of the prosecutrix, B, the foreman of the grand jury before whom the prosecutrix testified against A, is called as a witness. The question is, whether B is competent to testify.

B is a competent witness.[16] "It was at one time supposed

13—Sparhawk v. Sparhawk, 10 Allen (Mass.) 155.

14—1 Greenleaf on Evid., § 410.

15—Rogers v. State, 60 Ark. 76, 29 S. W. R. 894. See also, People v. Dohring, 59 N. Y. 374.

16—Gordon v. Com., 92 Pa. St. 216.

that a grand juror was required, by his oath of secrecy, to be silent as to what transpired in the jury room; but it is now held that such evidence, whenever it is material to explain what was the issue before the grand jury, or what was the testimony of particular witnesses, will be required."[17]

12. A sues B in assumpsit. The question is, whether, in the case of an award, in which it is recited that the arbitrators have disposed of the matter submitted to their arbitrament in the manner required by the agreement for submission, parol evidence of the arbitrators is admissible to show that they disposed of such matter in another and different manner.

The parol evidence of the arbitrators is inadmissible.[18] Parol evidence of arbitrators is admissible to *sustain* their award, but not, as a general rule, to *impeach* it. But in cases of fraud and mistake parol evidence of the arbitrators is admissible to *impeach* their award.[19]

13. A sues B in assumpsit for the price of some coal. On the trial, B offers his attorney, F, as a witness in his behalf, after F has opened the case for B and examined witnesses in B's behalf. A objects to F acting as a witness on the ground of incompetency, and the court sustains the objection. A verdict is rendered for A and judgment is entered in his favor. The question is, whether the court's ruling is prejudicial error.

The court's ruling, that F is an incompetent witness, is prejudicial error.[20]

14. A, by his attorney F, sues B on a promissory note. After the action is commenced, the note, which has been in F's hands for collection, is lost. The question is, whether F is a competent witness to prove the loss of the note and the contents thereof.

F is a competent witness. "There is no objection to the witness pointed out, and he was clearly admissible to show that the note was lost, and to prove its contents."[21]

17—1 Wharton on Evid., § 601. See also, Com. v. Mead, 12 Gray (Mass.) 167; Way v. Butterworth, 106 Mass. 75; State v. Fassett, 16 Conn. 457.

18—Schmidt v. Glade, 126 Ill. 485, 492.

19—Pulliam v. Pensoneau, 33 Ill. 375.

20—Follansbee v. Walker, 72 Pa. St. 228. See also, Cobbett v. Hudson, 22 L. J. Q. B. D. 11; Frear v. Drinker, 8 Barr 521; Potter v. Inhabitants of Ware, 55 Mass. 519.

21—Abbott v. Striblen, 6 Ia. 190, 195.

ILLUSTRATIONS ON PRIVILEGED COMMUNICATIONS.

1. A sues B on his promissory note. The question is, whether C, the attorney in whose hands the note was placed for collection, can be compelled to testify whether the note was indorsed or not when he received it.

C is a privileged witness, and cannot be compelled to disclose whether the note was indorsed or not when he received it. The privilege extends not only to what C *heard*, but also to what he *saw*, as an attorney.[1] As Lord Ellenborough says, "One sense is privileged as well as another. He cannot be said to be privileged as to what he hears, but not as to what he sees, where the knowledge acquired as to both has been from his situation as an attorney."[2] The privilege, however, is for the benefit of the client and not for the benefit of the attorney; and only the client can waive it.[3] But no privilege is created unless the relation of attorney and client actually exists.[4] And the burden of proof is upon the party claiming the privilege to show that the communications are privileged.[5] Communications made to a law student in an attorney's office are not privileged.[6]

2. A files a bill against B to compel the specific performance of a contract. The question is, whether C, an attorney whom both parties consulted in the presence of each other concerning the subject-matter of the suit, is a competent witness.

C is a competent witness. The general rule, that communications between attorney and client are privileged, is not applicable to this case. What A and B said to the attorney was

1—Dietrich v. Mitchell, 43 Ill. 40.

2—Robson v. Kemp, 5 Esp. 52.

3—Wood v. Thornly, 58 Ill. 464.

4—Granger v. Warrington, 3 Gilm. (Ill.); Goltra v. Wolcott, 14 Ill. 89.

5—McLaughlin v. Gilmore, 1 Ill. App. 553.

6—1 Mytne v. Keen, 103 (In this case Lord Brougham says, "The witness, in this case, was not of the legal profession, and though he was a student in an attorney's office, yet it does not appear that he was either the attorney's agent or clerk for any purpose. . . . If the plaintiff's communication was made to the witness in his capacity as a student in Mr. Whitney's office, it is not privileged"). See also, Barnes v. Harris, 7 Cush. (Mass.) 576.

also communicated to each other. "The reason for the rule is, that the other party shall not be informed of admissions and facts made known to the attorney, so as to be used against the client. Here no such reason exists."[7]

3. A files a bill against B for an injunction. The subject-matter of the suit comprises a deed conveying property from A to B. The question is, whether C, the attorney who acted as scrivener in drawing up the deed, is a competent witness to testify to the transaction.

C is a competent witness and may be compelled to testify. He was not consulted as an attorney, but employed merely as a scrivener.[8] It has been held, however, that where an attorney is employed to draw up an assignment of certain contracts of a debtor, which assignment is attacked by creditors as fraudulent, the attorney is privileged, and cannot be compelled to disclose what is said by the debtor with respect to his intent or purpose in making the assignment.[9]

4. B, the personal representative of A, sues the city of C to recover damages for personal injuries to A resulting in her death, and which are alleged to have been caused by C's negligence. The question is, whether the testimony of A's physicians regarding her condition, and the information obtained while treating her, are privileged under a statute which provides "that no physician shall be allowed to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice."

Under the statute the information acquired is privileged; but at common law it is not.[10]

5. A sues B., a physician, for malpractice in the treatment of his wife. A statute provides that information acquired by a physician in rendering professional services shall not be dis-

7—Lynn v. Lyerle, 113 Ill. 128, 134. See also, Griffin v. Griffin, 125 Ill. 430.

8—De Wolf v. Strader, 26 Ill. 225.

9—Hollenbach v. Todd, 119 Ill. 543.

10—Baxter v. City of Cedar Rapids, 103 Ia. 599. See also, Kenyon v. City of Mondovi, 98 Wis. 50.

closed without the consent of the patient. The question is, whether B may testify to information acquired by him while attending A's wife in a professional capacity, which information was essential to enable him to properly treat her, without the consent of A's wife.

B may testify to the information so acquired notwithstanding the existence of the statute. Such statutes are to be given a liberal interpretation. Since no other person besides B and A's wife has any knowledge of the facts, and proof of such facts is essential to sustain B's defense, the exigencies of the case require that the statute be not applied.[11]

6. Based upon the statement of facts, in the question next preceding, the question is, whether A's wife is a competent witness in behalf of her husband.

At common law, a married woman is incompetent to testify in behalf of her husband. But, notithstanding this rule, in an action by a husband against a physician for malpractice in the treatment of his wife professionally, where the facts in the case are known only to the physician and the wife, and without her testimony the remedy afforded the husband by law will fail, the exigencies of the case render the wife a competent witness in behalf of her husband.[12]

7. A sues the B. Ins. Co. on a policy of insurance on his wife's life. C, the attending physician in her last sickness, is dead. A statute provides that information acquired by a physician while rendering professional services shall not be disclosed without the consent of the patient. The question is, whether a deposition by C, concerning information acquired by him while treating A's wife professionally during her last sickness, but made *before* the enactment of the statute, is admissible in evidence.

C's deposition is admissible. It is to be observed, however, that if C were living he would not be allowed to disclose the information. But if a person, competent at the time to testify, is examined as a witness in a cause, and subsequently and before the trial becomes incompetent, his testimony taken when he was competent is admissible.[13]

11—Cramer v. Hurt, 154 Mo. 112, 77 Am. St. Rep. 752.

12—Cramer v. Hunt, *supra.*

13—Wells v. Ins. Co., 187 Pa. St. 166.

8. A is on trial on the criminal charge of robbing B of a watch. After A had committed the robbery he confessed his guilt to C, a Roman Catholic priest, and turned the watch over to him. C turned it over to D, the officer who arrested A. The question is, whether C can be compelled to disclose upon the stand A's confession of guilt.

At the common law, communications between spiritual advisers and laymen are not privileged. Under this rule, therefore, C is bound to disclose A's confession of guilt. Refusal on his part renders him liable to be adjudged guilty of contempt of court.[14] In most jurisdictions, however, statutes have been enacted which render communications between spiritual advisers and laymen privileged. The New York statute is as follows: "A clergyman or other minister of any religion shall not be allowed to disclose a confession made to him in his professional character in the course of discipline enjoined by the rules or practice of the religious body to which he belongs."[15]

9. A sues the United States, in the Court of Claims, on a contract for secret service made between the president of the United States and himself. The question is, whether the action can be maintained.

Upon grounds of public policy, such an action cannot be maintained. As said by Justice Field, "It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his council for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed."[16]

14—Regina v. Hay, 2 F. & F. 4 (1860).

15—New York: C. C. P. 1887, § 833.

16—Totten v. United States, 92 U. S. 105, 107.

10. A sues B for falsely and maliciously representing to the treasury department of the United States that A was intending to defraud the revenue. The question is, whether B can be compelled to answer interrogatories filed by A inquiring whether he did not give or cause to be given to the treasury department information of supposed or alleged frauds on the revenue contemplated by A.

B cannot be compelled to answer A's interrogatories. The information, if any, furnished by B to the officers of the treasury, is privileged, and courts of justice will not compel or permit its disclosure without the assent of the government.[17]

11. A is on trial for the crime of counterfeiting. The question is, whether the officer who arrested A can be compelled to disclose the name of the person from whom he received the information which led to A's detection and arrest.

The officer cannot be compelled to disclose such information. As said by Justice Washington, "Such disclosure might be highly prejudicial to the public in the administration of justice by deterring persons from making similar disclosures of crimes which they knew to have been committed."[18]

12. A sues B in an action of trover, based upon a claim for a quantity of wood cut from trees purchased from B and paid for in work and labor performed by him. B defends on the ground that A had previously brought an action in assumpsit for such work and labor and recovered a judgment in that action, and that therefore the trees and wood cut therefrom was not A's property. The question is, whether B may show by the jurors in the assumpsit case, that in arriving at their verdict, they allowed the plaintiff for the full amount of labor claimed by him.

The jurors are incompetent witnesses. Jurors are competent to prove what testimony has been given upon a trial in which

17—Worthington v. Scribner, 109 Mass. 487.

18—United States v. Moses, 4 Wash. C. C. 726. See also, State v. Soper, 16 Me. 293 (In this case the court holds that the owner of stolen goods, when called as a witness for the government, upon the trial of the accused for larceny, cannot be compelled to disclose the name of the party who furnished him with information that led to the arrest).

they have served; but they may not disclose the elements of their verdict, nor their deliberations by which it was reached. The verdict itself is the best evidence of the result of their deliberations.[19]

13. A sued B in covenant, and a verdict was rendered for B. The question is, whether the affidavit of one of the jurors is admissible to impeach the verdict, and whether the affidavits of certain other jurors are admissible to sustain it.

As a general rule, the affidavit of a juror is not admissible to impeach a verdict. On the other hand, it is held that it is admissible to sustain a verdict.[20] Upon principle, however, and according to the better view, the affidavit of a juror is admissible to impeach a verdict provided the affidavit does not concern any matter which essentially inheres in the verdict itself.[21]

14. A sues B for fraud. The foreman of the jury, by mistake, announces a verdict different from that agreed to by the jury, and the erroneous verdict is recorded. The question is, whether affidavits of the jurors are admissible to prove the mistake with the view of having the record corrected so as to make it conform to the actual finding.

The affidavits of the jurors are admissible. The general rule which prohibits jurors from being heard to impeach their verdict is not applicable here. As said by Justice Allen, "It is not an attempt to reverse their action in the jury room but to establish it. It is in the nature of a clerical mistake. Had the jury rendered a sealed verdict, and their clerk or scrivener made a mistake in reducing it to writing, a correction of the writing after it had reached the court and been entered on the minutes would be no impeachment of the verdict or of the integrity, intelligence or action of the jury. The jury in furnishing proof of the clerical mistake would stand by their agreement and aid in giving effect to their deliberations and determinations."[22]

15. A is on trial for larceny. For the purpose of impeaching the credibility of B, who has testified in the case, C, a grand juror, is called to testify to B's evidence before the grand jury

19—Hewett v. Chapman, 49 Mich. 4.

20—Peck v. Brewer, 48 Ill. 54.

21—Wright v. Tel. Co., 20 Ia. 195.

22—Dalrymple v. Williams, 63 N. Y. 361, 364.

upon the same point. The question is, whether C is a competent witness.

C's testimony upon the matter involved is admissible. Where the ends of justice demand it, there is no reason why evidence given before a grand jury should not be made known and proved. It is solely a question of public policy.[23] Justice Mercur says, "The reasons given at an early day for excluding the kind of evidence offered, and for holding a grand juror incompetent to testify to such facts have lost their force. . . . A wise public policy, and the rights of person and of property, require us to hold the foreman of the grand jury to be a competent witness for the purpose offered."[24]

16. A files a bill against B to reform an award for an alleged mistake of the arbitrators. The bill alleges that the arbitrators by mistake omitted to allow A a credit of more than five hundred dollars, to which he was entitled, which they intended and supposed they had allowed. The question is, whether the arbitrators are competent witnesses to prove the mistake.

As a general rule, arbitrators will not be heard to impeach their award; and parol evidence tending to show that the arbitrators did not intend what their determination on its face declares, is not admissible to contradict or impeach the award.[25] To this general rule, however, some courts sometimes make an exception in the case of fraud or mistake. A mistake, however, in either the law or the facts is not usually corrected by the courts. It is only in cases of clear and unquestionable mistake that a court of equity will interpose to reform the award or set it aside. And to entitle a party to such relief it is necessary that the mistake be that of *all* the arbitrators.[26] It is very generally held, however, that arbitrators are competent witnesses to *sustain* their award.[27]

17. A files a bill against B to enforce the specific performance of a contract for the conveyance of a tract of land. The question is, whether B may testify to declarations of his wife concerning the subject-matter of the suit.

23—Bressler v. The People, 117 Ill. 422.

24—Gordon v. Com., 92 Pa. St. 216.

25—Doki v. James, 4 N. Y. 568.

26—Pulliam v. Pensoneau, 33 Ill. 375.

27—Stone v. Atwood, 28 Ill. 30.

B is incompetent to testify to his wife's declarations, both at common law and under the statute. "If this action had been one between husband and wife the evidence might have been competent; but the action was not between husband and wife, and the declarations of the wife could not be proven by her husband."[28]

§ 18. A and B are on trial on the criminal charge of willfully driving an ox upon a railroad track. The question is, whether a letter, written by C, a witness for the state, which contains an admission in favor of the accused, and which has gotten into the hands of the attorneys for the defendants, is admissible in evidence.

The letter is not admissible. "The matter that the law prohibits either the husband or wife from testifying to as witnesses includes any information obtained by either during the mar-

28—Joiner v. Duncan, 174 Ill 252, 256. See also, Goelz v. Goelz, 157 Ill. 33.

The Illinois statute provides that "No husband or wife shall, by virtue of section 1 of this act (removing the disqualifications of interest and conviction of an infamous crime), be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of a personal wrong or injury done by one to the other or grows out of the neglect of the husband to furnish the wife with a suitable support; and except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce; and except also in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed, or in actions against carriers, so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under the provisions of this act: *Provided*, that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife." Hurd's Rev. Stats. (1903), chap. 51, sec. 5.

riage, and by reason of its existence. It should not be confined to mere statements by one to the other, but embraces all knowledge upon the part of either obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known. And the same rule prevails in full force after the marital relation has been dissolved by death or divorce. . . . There is a considerable array of authorities to the effect that when confidential communications between husband and wife, or between attorney and client, get out of the possession and control of the parties to the confidence, and that of their agents and attorneys, and find their way into the possession and control of third persons, regardless of the manner in which the possession thereof may be obtained by such third persons, then such communications lose the protected privilege of the law, and become competent and admissible evidence. We cannot agree to the correctness of this rule thus broadly laid down by these and other authorities, but think the policy of the law, that forms the foundation of the rule, is far more strongly upheld and subserved by those authorities that recognize and declare certain classes of communications to be privileged from the inherent character of the communication itself, and that in such cases the privilege attaches to the communication itself, and protects it from exposure in evidence, wheresoever or in whosesoever hands it may be."[29]

29—Mercer v. State, 40 Fla. 216, 24 S. Rep. 144.

ILLUSTRATIONS ON EXAMINATION OF WITNESSES.

1. A files a bill against B for a divorce. Before the trial, B makes a motion that the witnesses be examined separately and out of the hearing of each other. The court denies the motion, and a decree is granted. The question is, whether the court's ruling is prejudicial error.

The court's ruling is not prejudicial error. As said by Chief Justice Caton, "It was matter of discretion with the circuit court, whether the complainant's witnesses should be separated during the examination, and we will not inquire whether that discretion was judiciously exercised or not."[1]

2. A is on trial for murder. B and C are accomplice witnesses for the state. The court issues an order separating the witnesses. B violates the order. The question is, whether A, as matter of right, may demand that B be excluded from testifying in the case.

A is not entitled, as matter of right, to have B excluded from testifying. It is a matter which rests in the discretion of the court. As said by Justice Scholfield, "The disregard of this rule might have afforded good grounds for the punishment of the parties for contempt, but it was within the discretion of the court. . . . If witnesses, after an order of separation, upon being spoken to by third parties in violation of an order of court, would become thereby disqualified to testify, a wide door wood be opened to unscrupulous friends of those charged with crime to disqualify all material prosecuting witnesses."[2]

3. A, who sues B in assumpsit for work and materials, testifies in his own behalf. For the purpose of refreshing his recollection he proposes to examine a copy or memorandum of entries in his books of account. B objects. The question is, whether the objection should be sustained.

B's objection should be overruled. A is entitled to refresh his memory by examining the copy; but the copy itself is inadmissible. As said by Justice Sheldon, "The original entries, if

1—Errissman v. Errissman, 25 Ill. 120.

2—Bulliner v. The People, 95 Ill. 394, 399.

shown to have been correctly made, might have been read in evidence, but not the copy from them. The latter might be used only to refresh the memory. The copy of a writing, as well as the original, may be referred to by a witness, if his memory, refreshed thereby, enables him to testify from his own recollection of the original facts, independent of his confidence in the accuracy of the copy. But he is not, in such case, to read from the copy."[3]

4. A, who sues B for rent and board, testifies in her own behalf. The question is, whether she should be allowed to refresh her *past* recollection by examining an account book kept by her husband, the entries in which she saw him make, and knows them to be correct, although she has no distinct remembrance of the specific items therein contained.

A is entitled to examine the account-book with the view of testifying to her past recollection, even though she has no present remembrance of the facts therein recorded. As said by Justice Baker, "A witness may refresh and assist his memory by the use of a memorandum or entry in a book when he recollects having seen the writing before, and while the facts were fresh in his memory, and though he has, at the time of testifying, no independent recollection of the facts mentioned in it, yet remembers that at the time he saw it he knew the contents to be correct."[4]

It is to be observed, however, that the witness must have either a present or past recollection concerning the matter, and that he will not be permitted to gain his information originally from the memorandum and testify wholly from it.[5]

5. A is on trial for grand larceny. The question is whether the following instruction by the court is erroneous: "The court

3—Bonnet v. Glattfeldt, 120 Ill. 166, 173.

4—Flynn v. Gardner, 3 Ill. App. 253, 255, 256. See also, 1 Greenleaf on Evid., §§ 436, 437.

5—Miller v. Preble, 142 Ind. 632, 42 N. E. Rep. 220; Erie Preserving Co. v. Miller, 52 Conn. 444, 52 Am. Rep. 607 (In this case the court say, "It is a well-settled rule that a witness may refer to memoranda made by himself or by others, for the purpose of refreshing his memory, but it must be for the sole purpose of refreshing his memory, not for the purpose of gaining entirely original information from them").

instructs the jury that one of the modes recognized by law for impeaching the veracity of a witness is the introduction of persons as witnesses who testify that they are acquainted with the general reputation for truth and veracity of the person sought to be impeached, in the neighborhood in which he resides; and if the jury believe, from the evidence in this case, that the reputation for truth and veracity of any party or witness who has testified before you, in the neighborhood in which he resides, is bad, then the jury have a right to disregard the whole of such person's testimony and treat it as untrue, except so far as it is corroborated by other credible evidence or by facts and circumstances proved on the trial."

The instruction is correct. As said by Justice Craig, "We think the law is well settled that where the general reputation of a witness for truth and veracity is bad in the neighborhood where he resides, the jury may disregard his evidence, except so far as it is corroborated by other evidence or by the facts and circumstances proven on the trial."[6]

6. A sues B, a surgeon, for malpractice. Among others, the court gives the jury the following instruction: "The court instructs the jury that if you believe from the evidence that any witness in this case has sworn falsely to any material fact in issue, then you are at liberty to disregard the whole of such witness' testimony except wherein it is corroborated by other credible evidence in the case." A recovers a verdict for $2,000. The question is, whether the instruction quoted is prejudicially erroneous.

The instruction is prejudicially erroneous. To entitle the jury to disregard the whole of such witness' testimony he must have sworn falsely *willfully*. As said by Presiding Justice Harker, "The vice of this instruction is that it omits the essential element that the witness had knowingly or willfully sworn falsely. A witness may be honestly mistaken as to some material fact and innocently swear falsely concerning it, and his testimony on other points be worthy of belief. The knowledge or willfulness of the untrue statement is the test for his impeachment."[7] And as said by Justice Scott, "A witness can not be

6—Hill v. Montgomery, 184 Ill. 220, 225.

7—Littlejohn v. Arbogast, 95 Ill. App. 608.

discredited simply on the ground of an erroneous statement; it is only where the statements of a witness are willfully and corruptly false in regard to material facts, that the jury are authorized to discredit the entire testimony."[8]

7. A, who sues B in ejectment, introduces in evidence C's deposition. B seeks to impeach C's credibility by showing by oral evidence that C was convicted of forgery. The court, however excludes this evidence. The question is, whether the court's ruling is erroneous.

The credibility of a witness may be impeached by showing that he has been convicted of an infamous crime. As a general rule, this can be done only by producing the record or an authenticated copy of it. In Illinois, however, by statute, it may be done by oral evidence. According to the rule in this state, therefore, the court's ruling is erroneous.[9]

It is to be observed, however, that, under the Illinois statute the credibility of a witness cannot be impeached by showing that he has been convicted of a minor offense. As said by Justice Boggs, "The enactment of said section 1 of our statute on evidence has no effect to authorize the introduction of proof of the conviction of the witness of an offense that would not have rendered him incompetent to testify in the absence of the statute."[10]

8. A sues B in assumpsit for money loaned. The question is, whether former declarations of a witness, whose credibility is attacked, are admissible in evidence for the purpose of corroborating him.

Upon this question, the decisions are in conflict; but according

8—Pope v. Dodson, 58 Ill. 360. See also, Mathews v. Granger, 196 Ill. 164, 171 (In this case the court say, "Moreover, it is only where the jury conclude that the witness has willfully testified falsely in a matter material to the issue being tried, or that he has been successfully impeached, that the jury are authorized to disregard his entire testimony, where not corroborated"); and Overtoom v. Chicago, etc., Ry. Co., 181 Ill. 323 (In this case the court say, "It is the corrupt motive, or the giving of false testimony knowing it to be false, that authorizes a jury to disregard the testimony of a witness").

9—Gage v. Eddy, 167 Ill. 102.

10—Matzenbaugh v. The People, 194 Ill. 108, 113. See also, Bartholomew v. People, 104 Ill. 601.

to the decided weight of authority the former declarations are inadmissible.[11]

9. A sues B in attachment. C testifies in A's behalf. B seeks to impeach C's credibility by showing by several witnesses that his general reputation for truth and veracity is bad. These witnesses testify that they know C's reputation for truth and veracity, in the neighborhood in which he lives, and that it is bad. They are not asked, however, whether they would believe him on oath or not, and A contends that owing to this omission their evidence does not go far enough to impeach C. The question is, whether A's contention is correct.

A's contention is erroneous. In seeking to impeach the credibility of a witness by showing that his general reputation for truth and veracity is bad, it is optional with the party seeking his impeachment to ask the opinions of the impeaching witnesses, and in no case compulsory. As said by Justice Craig, "But while the rule we have heretofore established permits the witness, after he has stated that he knows the general reputation of the person for truth and veracity among his neighbors, to go on and state that, judging from such reputation, he would not believe the person upon his oath, yet this court has never held, and we do not understand it to be the law, that the rule is compulsory that the opinion of the witness should be asked or stated."[12] On the other hand, if the court should prohibit the impeaching witness from giving his opinion, after he has sworn that he has knowledge of the other's general reputation, and that it is bad, the court's ruling would be erroneous.[13]

It is also to be observed that, after the impeaching witness has given his testimony, he may be cross-examined by the adverse party as to his means of knowledge and the grounds of his opinion.[14] But the fact that other persons in the neighborhood had not heard the witness' general reputation discussed is not admissible as rebuttal evidence to that given by the impeaching witness.[15]

11—Stolp v. Blair, 68 Ill. 541, 543.

12—Laclede Bank v. Keeler, 109 Ill. 385, 390. See also, Frye v. Bank of Illinois, 11 Ill. 367; Eason v. Chapman, 21 Ill. 34; Massey v. Bank, 104 Ill. 327.

13—Eason v. Chapman, *supra.*

14—Dowie v. Black, 90 Ill. App. 167.

15—Magee v. People, 139 Ill. 138.

10. A sues B in assumpsit for services rendered. The evidence given by the parties themselves is contradictory. For the purpose of supporting his evidence, A calls a number of witnesses to prove his general character for truth and veracity. B objects to such evidence on the ground that A's credibility has not been impeached. The court overrules the objection, and A recovers a verdict. The question is, whether the court's ruling is prejudicially erroneous.

The court's ruling is prejudicially erroneous. Merely contradictory evidence is not such evidence of impeachment as entitles the party whose witness is thus contradicted to introduce evidence of his good character for truth and veracity. To entitle the party to introduce such evidence the character of the witness for truth and veracity must be directly attacked. As said by Justice Walker, "As we understand the rules of evidence, a witness can not call witnesses to support his general character for truth and veracity until it is assailed. Mere contradictions, or different versions by witnesses, do not justify the application of the rule that he may call witnesses to support his character for truth. When witnesses are called who say his general character is bad, then he may call witnesses in support of his general character. Before he can do so his general character must be attacked. If the practice sanctioned the calling of witnesses to prove general character whenever a witness is contradicted, it would render trials interminable. The greater portion of the time of courts would be liable to be engaged in the attack and support of the characters of witnesses. If permitted, each of the contradicting witnesses would have the same right, and not only so, but all of the supporting witnesses on each side contradicting each other would be entitled to the same privilege. It is thus seen that the rule must be limited to cases where witnesses are called to impeach the general character of a witness, otherwise it, instead of assisting truth by the verdict, would tend to stifle it under a large number of side issues, calculated to obscure and not to elucidate them."[16]

11. A sues B in trespass for assaulting, beating and wounding her. A and her daughters testify in her behalf. For the purpose of impeaching these witnesses, B offers to show by other witnesses that A and her daughters had, at various times and

16—Tedens v. Schumers, 112 Ill. 263, 266, 267.

places, committed adultery, and that they had also been guilty of selling spirituous liquors in violation of law. A objects to this testimony and the court sustains the objection. A recovers a verdict. The question is, whether the court's ruling is prejudicial error.

In many jurisdictions, evidence of the general immoral character of a witness is admissible to impeach his credibility. But even in these jurisdictions evidence of *particular acts* is excluded. In many other jurisdictions, including Illinois, the impeaching evidence is restricted to the general reputation of the witness for truth and veracity. As said by Justice Trumbull, "The complainants made an unsuccessful attempt to impeach the general credibility of this witness, and with that view offered evidence of particular facts, and of his general reputation in other respects than for truth and veracity. All evidence of such a character is improper, and should be rejected. The authorities are uniform that it is only the general reputation of a witness that can be inquired into, for the purpose of impeaching his testimony; and although there is some conflict in the decisions, as to whether the inquiry should be confined to the general character of the witness for truth and veracity, we think the better rule is, that it should be so confined."[17] Justice Scholfield, after quoting Justice Trumbull's view, says, "This doctrine has been frequently referred to with approval in subsequent cases, and in no instance questioned. It is true, in prosecutions for rape, assault with intent to commit rape, and indecent assault, the character of the prosecutrix for chastity may be inquired into; but evidence of sexual prostitution is not admissible to impeach a witness, or to affect his or her credit, in any other class of cases."[18] And Justice Walker says, "It has never been the practice in this state to permit a witness, in support of his character for veracity, to prove that he has been honest in his dealings, or moral and free from vice. It does not follow that because a man deals honestly, and is otherwise moral, he is therefore truthful. Nor is it believed that because a man is not fair in his dealings, or is immoral, he is therefore untruthful."[19]

12. A sues the B. Ry. Co. for damages for negligently caus-

17—Frye v. Bank of Illinois, 11 Ill. 366, 379.

18—Dimick v. Downs, 82 Ill. 570, 573.

19—Tedens v. Schumers, *supra*.

ing the death of her husband at a certain crossing. Upon his cross-examination, C, the company's engineer, testifies that he always rang the bell at that crossing. The question is, whether contradictory evidence is admissible for the purpose of impeaching C.

The contradictory evidence is inadmissible. The statement sought to be contradicted is brought out on C's cross-examination, and it relates to a distinct collateral fact. It follows, therefore, that it is conclusive and may not be contradicted. As said by Justice Sheldon, "A witness is not to be cross-examined as to any distinct collateral fact, for the purpose of afterwards impeaching his testimony by contradicting him. If a question, as to a collateral fact, be put to a witness for the purpose of discrediting his testimony, his answer must be taken as conclusive, and no evidence can be afterwards admitted to contradict it."[20]

13. A sues the B. Ry. Co. for damages for negligently causing C's death. D, one of A's witnesses, is asked upon his cross-examination whether he made the statement, at the time of the accident which caused C's death, that C was in the habit of going home intoxicated; and D answers in the negative. The question is, whether, upon this point, evidence is admissible to contradict D.

Since D's answer is brought out on his cross-examination, and relates to a statement which is merely a collateral fact, it is conclusive. As said by Justice Sheldon, "The testimony was not admissible for the purpose of impeaching Meade, as he had given no evidence upon that subject. It is true, he was asked, on cross-examination, whether he had not made such a statement and denied it. But the question was incompetent, as it was not relevant to any testimony which the witness had given, and his answer, it being as to a collateral matter, had to be taken as conclusive. It was not admissible afterward to contradict him in that respect, and thus introduce into the case his unsworn statements. If defendant sought any statement of Meade upon that subject, it should have examined him as a witness, and got his sworn statement."[21]

20—C., B. & Q. Ry. Co. v. Lee, 60 Ill. 501, 504. See also, 1 Stark. on Evid., 189.

21—C., R. I. & P. Ry. Co. v. Bell, 70 Ill. 102, 105.

14. A, whose husband has been convicted of grand larceny and sentenced to the penitentiary, employs C to obtain for her a divorce. C falsely and fraudulently represents to her that a decree of divorce has been granted to her, and she marries B. Subsequently she learns that C has deceived her, and she sues him for $10,000 damages for willfully, maliciously, fraudulently and falsely representing to her that she has been granted a divorce. A testifies in her own behalf; and upon her cross-examination C seeks to prove by her that her character for chastity is bad, by showing that she first became acquainted with B in a house of prostitution. The question is, whether A's character for chastity can be impeached in this way, in view of the fact that no evidence pertaining to her character was given by her in her examination-in-chief.

B's character for chastity cannot be impeached upon her cross-examination. As said by Justice Craig, "The object of this evidence was to prove that the character of the plaintiff for chastity was bad. It may be conceded that in an action of this kind, brought to recover damages sustained by the plaintiff to her good name and character, it was competent, in mitigation of damages, to prove the character of the plaintiff, and if appellant had offered competent evidence to establish that fact it might have been admitted. But appellant undertook to make proof of bad character on cross-examination of the plaintiff, and the court held that the evidence thus offered was incompetent on cross-examination. The court did not hold that appellant could not prove the fact at the proper time, but merely ruled, and so stated at the time, that the evidence was not admissible on cross-examination. If the plaintiff, on her direct examination, had given evidence in reference to her character, then, of course, the appellant would have been entitled to cross-examine her fully on this subject. But such was not the case. The plaintiff on her direct examination, was asked nothing and said nothing in regard to her character, and it was proper to confine the cross-examination to facts called out in chief."[22]

22—Hill v. Montgomery, 184 Ill. 220, 222, 223.

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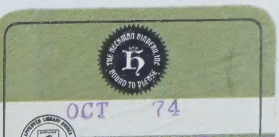
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